IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GREGORY L. RUCKS,

Plaintiff,

vs.

GARY BOERGERMANN,

Defendant.

Case No. 92-C-263-BU

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Michael Burrage, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff, Gregory L. Rucks, take nothing by way of his claim against the defendant, Gary Boergermann, and that judgment is entered in favor of the defendant, Gary Boergermann, and against the plaintiff, Gregory L. Rucks.

Dated at Tulsa, Oklahoma, this 20 day of September, 1994.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

37

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH ANGELO DICESARE,

Plaintiff,

vs.

J.D. BALDRIDGE, et al,

Defendants.

No. 93-C-507-K

ORDER

On August 30, 1994, the Court notified Plaintiff that in ten (10) days it would dismiss without prejudice defendant Doug Hudelson for failure to serve within 120 days after the filing of the complaint. See Fed. R. Civ. P. 4(m) (effective December 1, 1993). Although Plaintiff filed a supplemental objection to Defendants' motion for summary judgment on September 15, 1994, he did not object to the dismissal of Mr. Hudelson for failure to serve.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant Doug Hudelson be **dismissed without prejudice for** lack of service.

SO ORDERED THIS 19 day of September, 1994.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

35

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CAROL ANN LITTLE, and ROBIN LITTLE, a minor, by and through her next friend, CAROL ANN LITTLE,	
Plaintiff,	
vs.	**Case No. 93-C-760-K**
TOWN OF OOLOGAH, OKLAHOMA, a municipal corporation,	
Defendant.	

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Town of Oologah, Oklahoma, and against the Plaintiffs, Carol Ann Little and Robin Little. Plaintiffs shall take nothing of their claim. Costs are assessed against the Plaintiffs, if timely applied for under Local Rule 54.1, and each party is to pay its respective attorney's fees.

Dated, this 15 day of September, 1994.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHRISTINA L. COLEMAN, Plaintiff, v. BLUE CROSS BLUE SHIELD OF OKLAHOMA, Defendant.	)	Case No. 94-C-88-BU

ENTERED ON DOCKET
DATE SEP 20 1994

ORDER OF DISMISSAL WITH PREJUDICE

Being presented with the Joint Stipulation of Dismissal with Prejudice, the Court finds that this matter should be so dismissed.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the above-styled and numbered cause of action is hereby dismissed with prejudice.

Dated this 19th day of September, 1994.

s/ MICHAEL BURRAGE

United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

OXY USA INC.,	)	
	)	
Plaintiff,	)	
	)	
versus	)	
	)	
THE UNITED STATES DEPARTMENT OF THE INTERIOR;	)	**CIVIL ACTION**
BRUCE BABBITT, SECRETARY, DEPARTMENT OF THE INTERIOR;	)	**NO. 93-C-667-BU**
ROBERT ARMSTRONG, ASSISTANT SECRETARY - LAND AND MINERALS MANAGEMENT, DEPARTMENT OF THE INTERIOR;	)	
TOM FRY, DIRECTOR, MINERALS MANAGEMENT SERVICE, DEPARTMENT OF THE INTERIOR;	)	
and GARY L. JOHNSON, AREA MANAGER, DALLAS AREA AUDIT OFFICE, MINERALS MANAGEMENT SERVICE, DEPARTMENT OF THE INTERIOR,	)	
	)	
Defendants.	)	

ORDER TO CONTINUE STAY

Upon consideration of Plaintiff's and Defendants' Joint Motion To Stay, it is ORDERED that the motion be, and it is hereby granted and that this case be stayed until October 31, 1994.

ENTER: September 19th, 1994.

Michael Burrage
JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE SEP 19 1994

CAROL JEAN RUTHERFORD,

Plaintiff,

vs.

ELAINE WITT, individually, and in her official capacity as Treasurer of Delaware County,

Defendant.

Case No. 94-C 218-K

FILED

SEP 16 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

NOW on this 16 day of September, 1994, this matter comes on for hearing pursuant to the Joint Stipulation of Dismissal and Application for Dismissal With Prejudice of the parties hereto. The Court, being fully advised in these premises, finds that the Application should be granted.

IT IS THEREFORE ORDERED that this cause is dismissed with prejudice.

UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TKI, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 94-C-409-K
	)	
CHROMALLOY GAS TURBINE CORPORATION, d/b/a AERO TECHNICAL SERVICES, d/b/a CHROMALLOY COMPRESSOR TECHNOLOGIES, d/b/a AERO TECHNICAL SERVICES GROUP, and d/b/a AERO COMPONENT TECHNOLOGIES GROUP,	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

Upon consideration of the parties' Stipulation and Joint Motion for Entry of Agreed Order of Dismissal with Prejudice, the Court finds that the Joint Motion should be granted and hereby orders that this action is dismissed with prejudice.

Dated this 16 day of Sept., 1994.

Terry C. Kern

THE HONORABLE TERRY KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F. E. BUCK COOK,

Plaintiff,

vs.

LARRY FIELDS, et al.,

Defendants.

No. 92-C-1175-K

ORDER

At issue before the Court in this prisoner's civil rights action is whether this action is moot due to the rescission of the Oklahoma Department of Corrections' grooming code policy. On August 24, 1994, the Court ordered Plaintiff to show cause why this case should not be dismissed as moot because he is no longer subjected to the grooming code policy about which he complained. The Plaintiff does not object to the fact that the Department of Correction (DOC) has rescinded the grooming code policy which was the subject of this action, but argues that he is entitled to "a permanent injunction . . . against the Defendants, prohibiting them from enacting any policy that requires the Petitioner to cut his hair or shave during the remaining of his incarceration." Plaintiff argues that the DOC has changed policy with regard to the length of a prisoner's hair and beard when it so desires and therefore, that he is entitled to some protection from future changes in policy. (Doc. #12.)

After carefully reviewing Plaintiff's response, the Court concludes that this action should be dismissed as moot because the Plaintiff is no longer subject to the condition which was the

subject of this action. See Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985). The Court must also reject plaintiff's request for a permanent injunction. While the Court understands that the DOC has changed policy with regard to the length of a prisoner's hair and beard on numerous occasions, the Court cannot grant Plaintiff a blanket injunction protecting him from all future policies which the DOC may want to implement in this area. The Plaintiff has not yet alleged a personal injury caused by the present hygiene code policy, or for that matter an injury caused by any future policy, over which this Court could assert jurisdiction. See Warth v. Seldin, 422 U.S. 490, 498-500 (1975) (to meet constitutional case and controversy requirement for federal court jurisdiction, plaintiff must allege a personal injury caused by defendant that is likely to be redressed by the relief requested). Therefore, Plaintiff's action must be dismissed as moot.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to dismiss or, in the alternative, for summary judgment [doc. #8] be **denied as moot** and that this action be **dismissed as moot.**

SO ORDERED THIS 16 day of September, 1994.

PERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GLADYS TOTTRESS,

Plaintiff,

vs.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 87-C-813-B

ORDER

Before the Court for consideration is Plaintiff Gladys Tottress's appeal (Docket #2), pursuant to 42 U.S.C. § 405(g), of the Administrative Law Judge's ("ALJ's") denial of Social Security benefits. This claim is based on complaints of lupus erythematosus, a back injury, muscle spasms and damaged nerves in Plaintiff's left wrist.

This claim was filed on May 1, 1986, and was denied by the ALJ on February 26, 1987. The Appeals Council affirmed the ALJ ruling on July 27, 1987. Plaintiff then sought judicial review. Upon agreement of the parties, the Court remanded this case for further consideration after new evidence indicated that Plaintiff might have lupus. After hearing the new evidence, the ALJ urged denial of the claim on November 23, 1988, but the Appeals Council remanded the case. The ALJ again denied benefits on August 27, 1991, and

res judicata was applied to all prior decisions.[1] On June 18, 1992, the Appeals Council affirmed the ALJ decision. Plaintiff then filed a motion to reopen, to which Defendant consented. The Court reopened this case on August 24, 1992.

Plaintiff asserts the following grounds for reversing the ALJ's denial of benefits:

> 1. The decision gives unwarranted weight to the opinion of Dr. Sutton, a consultative examiner;
>
> 2. The ALJ fails to properly weigh all relevant evidence by selectively reviewing the medical evidence and ignoring favorable medical evidence;
>
> 3. The decision improperly evaluates the credibility of Plaintiff's pain testimony and fails to accord proper weight to Plaintiff's pain testimony;
>
> 4. The decision fails to give proper weight to the opinion of Dr. Duncan, as the treating physician, that Plaintiff is totally disabled; and
>
> 5. Plaintiff's diagnosis of fibrositis constitutes new and material evidence which property prevents res judicata from being applied to the first and second ALJ decisions.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id. § 423

[1]Plaintiff had applied for, and been denied, Social Security benefits on four previous occasions: September 22, 1982; February 10, 1983; July 19, 1983; and December 19, 1984. None of these denials was the subject of judicial review.

(d)(1)(A). An individual

> shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

Id. § 423(d)(2)(A).

Under the Social Security Act, claimants bear the burden of proving a disability, as defined by the Act, which prevents them from engaging in their prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that the jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant evidence "that a reasonable mind might accept to support the conclusion." Campbell, 822 F.2d at 1521; Brown, 801 F.2d at 362.

The determination of whether substantial evidence supports the Secretary's decision, however,

> is not merely a quantitative exercise. Evidence is not substantial "if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985), *quoting* Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985). Thus, if the claimant establishes a disability, the Secretary's denial of disability benefits, based on the claimant's ability to do other work activity for which jobs exist in the national economy, must be supported by substantial evidence.

The Secretary has established a five-step process for evaluating a disability claim. *See* Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes, 845 F.2d at 243, proceed as follows:

(1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).

(2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).

(3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).

(4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).

(5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other

> work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If, at any point in the process, the Secretary finds that a person is disabled or not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 416.920.

In this case, the ALJ entered a decision at the fourth level of the sequence. The ALJ "is convinced that the claimant retains the functional capacity to engage in the full range of light exertional activity and could return to her past relevant work" (TR 699). Plaintiff, who has a twelfth-grade education and some vocational training in accounting, previously has worked as a credit clerk, employment interviewer and bank credit card collector.

Plaintiff's first, second and fourth arguments for reversal are based on the ALJ's evaluation of the evidence provided by the physicians. Plaintiff contends that the ALJ improperly weighed the evidence of treating physicians. She alleges that the ALJ gave unwarranted weight to the opinion of Dr. Sutton, a consultative examiner, and failed to give proper weight to the opinion of Dr. Duncan, as the treating physician.

Plaintiff claims that Dr. Sutton did not palpate her spine, thereby rendering his physical exam deficient and incapable of properly diagnosing myofaceitis (inflammation of muscle). The ALJ noted that Dr. Sutton did not state that he performed a palpation,

but the ALJ found that he "conducted active and passive range of motion studies which required the laying of hands upon various parts of the body." (TR 708).

A treating physician's opinion is entitled to extra weight unless it is contradicted by substantial evidence. Kemp v. Bowen, 816 F.2d 1469, 1476 (10th Cir. 1987); Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). Dr. Duncan, whom Plaintiff originally described as her treating physician,[2] stated that he believed Plaintiff to be 100 percent disabled because she told him she cannot sit or stand longer than 30 minutes, and cannot walk farther than one block (TR 649). His medical tests, performed on September 16, 1986, showed that she could bend forward 30 degrees, and extend and laterally bend 10 degrees (TR 647-8). Straight leg raising did not produce significant pain, and there were no significant sensory deficits, and deep tendon reflexes were equal and brisk in all extremities (TR 648). Dr. Duncan stated that he believes Plaintiff has myofaceitis. Id.

In April 1987, Dr. Duncan reviewed Plaintiff's records and stated that if Plaintiff had Lupus, it may explain her complaints of diffuse muscle pain (TR 867). He did not diagnose her as having Lupus. In August 1987, Dr. Duncan again reviewed Plaintiff's records, restating his belief that she was 100 percent disabled (TR 967). He did not examine Plaintiff at the time.

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[2]Plaintiff testified in 1991 at her supplemental hearing that Dr. Duncan was not a treating physician, and that she had not seen him since 1987 (TR 830).

Determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams v. Bowen, 844 F.2d 748, 755 (10th Cir. 1988). The ALJ can decide to believe all or any portion of any witness's testimony or evidence. In this case, the ALJ found the opinions of Dr. Sutton, Dr. Nelson and Dr. Andelman to be credible and to amount to substantial evidence contradicting the opinion of Dr. Duncan.

After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings. The Court does not interpose its judgment for that of the ALJ. The following is a brief summary of some of the relevant medical evidence presented to the ALJ that contradicted the opinion of Dr. Duncan.

In November 1987, Plaintiff told physicians at Morton Comprehensive Health Services ("Morton") that her back pain was largely relieved by using a rib belt (TR 922, 927). X-rays of her left hip, hand and wrist were negative (TR 915). In addition, a February 1988 examination indicated Plaintiff's rheumatoid factor studies were within normal limits, and other tests indicated no significant problems (TR 928-30).

In May 1988, Plaintiff was evaluated by Dr. Andelman, a consultative physician. Dr. Andelman found that Plaintiff's joints were tender, but found no swelling, redness or limitation of motion in Plaintiff's fingers, wrists, elbows and shoulders (TR 891). However, Dr. Andelman found that Plaintiff's hips could flex 50 degrees out of 90 degrees, and 75 degrees out of 125 degrees.

Plaintiff could flex her back forward only 25 degrees, extend 5 degrees and laterally bend 5 to 10 degrees. Id. The doctor found no definite neurologic deficits or muscle atrophy, and x-rays, SED rate and latex testing for rheumatoid arthritis were normal (TR 892).

In January 1991, Dr. Sutton found that Plaintiff had good grip strength and fine motor control of the upper extremities. Plaintiff performed straight leg raising to 80 of 90 degrees (TR 951). He found that Plaintiff had satisfactory strength and muscle control and a normal gait. Dr. Sutton reported that Plaintiff moaned and groaned with all movements, but that he saw her walk to her car at normal speed, enter her car without difficulty and drive off. Id. He believed that Plaintiff's complaints were entirely subjective and not accompanied by significant medical findings. Id.

The medical expert, Dr. Nelson, testified that all Plaintiff's test results appear to be within normal limits (TR 784). He stated that myofaceitis, with which Plaintiff was diagnosed, is a diagnosis usually given when there are no significant abnormalities in laboratory studies but the patient has subjective complaints (TR 783-4). He stated that this pain is real to the patient, but that rest and inactivity are unnecessary as a treatment. Instead, increased physical activity and exercising often are prescribed as treatment (TR 791). He saw nothing in Plaintiff's medical records or history to confirm a diagnosis of Lupus (TR 784). He also stated that Plaintiff's only apparent physical limitations were in her lower back, which showed signs of limited movement.

The ALJ accepted that Plaintiff had myofaceitis, or fibrositis (TR 709-10). "[T]he question now becomes how much of an impairment to claimant's ability to perform substantial gainful activity is the myofaceitis" or fibrositis. Id. The ALJ found that there appeared to be "very little functional impairment" suffered by Plaintiff (TR 711). The Court finds there is substantial evidence in the record to support the ALJ on this matter.

Plaintiff's third argument is that the ALJ did not properly evaluate her claim that the pain she suffers is disabling. "Subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988). Also, Plaintiff's subjective statements cannot take precedence over conflicting objective evidence. Williams, 844 F.2d at 755.

The ALJ considered all the evidence and the factors for evaluating subjective pain set forth in Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987), and concluded that Plaintiff's pain was not disabling. The ALJ stated that objective medical evidence showed no underlying medical condition so severe as to produce severe, disabling pain. In addition, Plaintiff's activities are inconsistent with a claim of incapacitating pain. Plaintiff stated that she performs light duties around her house. She said that she washes dishes, works crossword puzzles, reads, walks around the

yard twice a week, watches television, sits in church three times a week for two hours each time, goes shopping with friends and occasionally drives a car (TR 590). Plaintiff also testified that she eventually gets relief from Feldene, which lasts until the time she had to take her next pill (TR 826). She testified that she walks one mile for exercise (on a "good" day), and that, as of 1991, she no longer has wrist problems (TR 827-8, 845).

The ALJ also found Plaintiff to have a credibility problem. He found Plaintiff's claim of pain to be "highly exaggerated" (TR 721). He noted Dr. Sutton's observation of Plaintiff easily walking to her car and getting in with no apparent problems (TR 715). The ALJ also observed that Plaintiff had no apparent problems sitting through the administrative hearing, which lasted over an hour. Id. This, he said, contradicted Plaintiff's statements that she could sit for only 10 to 15 minutes. Id. He found that "[h]er testifmony flies in the face of almost all medical evidence." Id. As stated previously, determining the credibility of witnesses is solely with the province of the ALJ, so the Court does not disturb this finding.

In addition, the record shows that Plaintiff said she got relief with medication and treatment such as massages and rest (TR 826, 847-8, 976-7, 981). She also stated that using a rib brace largely relieved her back pain (TR 922, 927), and that she could sit for prolonged periods while using an orthopedic pillow (TR 801). An impairment that can reasonably be controlled with treatment is not disabling. Pacheco v. Sullivan, 932 F.2d 695, 698

(10th Cir. 1991).

Plaintiff's fifth argument for reversal states that diagnosis of fibrositis constitutes new and material evidence that prevents res judicata from being applied to the first and second ALJ decisions (rendered on August 24, 1984, and March 19, 1986). The ALJ applied res judicata to dismiss the claim as it applies to any period on or prior to March 19, 1986, the date this claim was filed. Because Plaintiff has not claimed that this action violated her constitutional rights, this Court has no jurisdiction to reopen these claims. A federal court has no jurisdiction to reopen a claim for disability benefits or determination that such claim is res judicata. Califano v. Sanders, 430 U.S. 99, 107-8 (1977). "The Secretary's decision not to reopen a previously adjudicated claim for benefits is discretionary and, therefore, is not a final decision reviewable under 42 U.S.C. § 405(g)." Brown v. Sullivan, 912 F.2d 1194, 1196 (10th Cir. 1990).

Even if the Court could reopen these claims, the new diagnosis of Plaintiff's fibrositis would not change the outcome since, at the time, Plaintiff was not found to be disabled. "It is true that a treating physician may provide a retrospective diagnosis of a claimant's condition ... However, the relevant analysis is whether the claimant was actually *disabled* ..." Potter v. Secretary of Health & Human Services, 905 F.2d 1346 (10th Cir. 1990) (emphasis in original). Since a determination was made that Plaintiff was not disabled at the time, a diagnosis will not change that fact now.

After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings that Plaintiff's impairment does not prevent her from performing her past relevant work. The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991). Although there is one doctor who stated that Plaintiff is totally disabled, there certainly is substantial evidence to support the ALJ's finding that Plaintiff is able to perform her past relevant work.

There appears to be little doubt that Plaintiff suffers from some pain. However, she has indicated that with treatment, such as painkillers, a rib brace and an orthopedic pillow, she can relieve this pain. This Court finds that there is sufficient relevant evidence in the record to support the ALJ's ruling that Plaintiff is able to perform her past relevant work. The Secretary's decision, therefore, is hereby AFFIRMED.

IT IS SO ORDERED THIS 19th DAY OF SEPTEMBER, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GLADYS TOTTRESS,

Plaintiff,

vs.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 87-C-813-B

ORDER

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res judicata was applied to all prior decisions.[1] On June 18, 1992, the Appeals Council affirmed the ALJ decision. Plaintiff then filed a motion to reopen, to which Defendant consented. The Court reopened this case on August 24, 1992.

Plaintiff asserts the following grounds for reversing the ALJ's denial of benefits:

> 1. The decision gives unwarranted weight to the opinion of Dr. Sutton, a consultative examiner;
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> 2. The ALJ fails to properly weigh all relevant evidence by selectively reviewing the medical evidence and ignoring favorable medical evidence;
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> 3. The decision improperly evaluates the credibility of Plaintiff's pain testimony and fails to accord proper weight to Plaintiff's pain testimony;
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> 4. The decision fails to give proper weight to the opinion of Dr. Duncan, as the treating physician, that Plaintiff is totally disabled; and
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> 5. Plaintiff's diagnosis of fibrositis constitutes new and material evidence which property prevents res judicata from being applied to the first and second ALJ decisions.

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The determination of whether substantial evidence supports the Secretary's decision, however,

> is not merely a quantitative exercise. Evidence is not substantial "if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985), *quoting* Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985). Thus, if the claimant establishes a disability, the Secretary's denial of disability benefits, based on the claimant's ability to do other work activity for which jobs exist in the national economy, must be supported by substantial evidence.

The Secretary has established a five-step process for evaluating a disability claim. *See* Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes, 845 F.2d at 243, proceed as follows:

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(2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).

(3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).

(4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).

(5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other

> work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If, at any point in the process, the Secretary finds that a person is disabled or not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 416.920.

In this case, the ALJ entered a decision at the fourth level of the sequence. The ALJ "is convinced that the claimant retains the functional capacity to engage in the full range of light exertional activity and could return to her past relevant work" (TR 699). Plaintiff, who has a twelfth-grade education and some vocational training in accounting, previously has worked as a credit clerk, employment interviewer and bank credit card collector.

Plaintiff's first, second and fourth arguments for reversal are based on the ALJ's evaluation of the evidence provided by the physicians. Plaintiff contends that the ALJ improperly weighed the evidence of treating physicians. She alleges that the ALJ gave unwarranted weight to the opinion of Dr. Sutton, a consultative examiner, and failed to give proper weight to the opinion of Dr. Duncan, as the treating physician.

Plaintiff claims that Dr. Sutton did not palpate her spine, thereby rendering his physical exam deficient and incapable of properly diagnosing myofaceitis (inflammation of muscle). The ALJ noted that Dr. Sutton did not state that he performed a palpation,

but the ALJ found that he "conducted active and passive range of motion studies which required the laying of hands upon various parts of the body." (TR 708).

A treating physician's opinion is entitled to extra weight unless it is contradicted by substantial evidence. Kemp v. Bowen, 816 F.2d 1469, 1476 (10th Cir. 1987); Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). Dr. Duncan, whom Plaintiff originally described as her treating physician,[2] stated that he believed Plaintiff to be 100 percent disabled because she told him she cannot sit or stand longer than 30 minutes, and cannot walk farther than one block (TR 649). His medical tests, performed on September 16, 1986, showed that she could bend forward 30 degrees, and extend and laterally bend 10 degrees (TR 647-8). Straight leg raising did not produce significant pain, and there were no significant sensory deficits, and deep tendon reflexes were equal and brisk in all extremities (TR 648). Dr. Duncan stated that he believes Plaintiff has myofaceitis. Id.

In April 1987, Dr. Duncan reviewed Plaintiff's records and stated that if Plaintiff had Lupus, it may explain her complaints of diffuse muscle pain (TR 867). He did not diagnose her as having Lupus. In August 1987, Dr. Duncan again reviewed Plaintiff's records, restating his belief that she was 100 percent disabled (TR 967). He did not examine Plaintiff at the time.

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[2]Plaintiff testified in 1991 at her supplemental hearing that Dr. Duncan was not a treating physician, and that she had not seen him since 1987 (TR 830).

Determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams v. Bowen, 844 F.2d 748, 755 (10th Cir. 1988). The ALJ can decide to believe all or any portion of any witness's testimony or evidence. In this case, the ALJ found the opinions of Dr. Sutton, Dr. Nelson and Dr. Andelman to be credible and to amount to substantial evidence contradicting the opinion of Dr. Duncan.

After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings. The Court does not interpose its judgment for that of the ALJ. The following is a brief summary of some of the relevant medical evidence presented to the ALJ that contradicted the opinion of Dr. Duncan.

In November 1987, Plaintiff told physicians at Morton Comprehensive Health Services ("Morton") that her back pain was largely relieved by using a rib belt (TR 922, 927). X-rays of her left hip, hand and wrist were negative (TR 915). In addition, a February 1988 examination indicated Plaintiff's rheumatoid factor studies were within normal limits, and other tests indicated no significant problems (TR 928-30).

In May 1988, Plaintiff was evaluated by Dr. Andelman, a consultative physician. Dr. Andelman found that Plaintiff's joints were tender, but found no swelling, redness or limitation of motion in Plaintiff's fingers, wrists, elbows and shoulders (TR 891). However, Dr. Andelman found that Plaintiff's hips could flex 50 degrees out of 90 degrees, and 75 degrees out of 125 degrees.

Plaintiff could flex her back forward only 25 degrees, extend 5 degrees and laterally bend 5 to 10 degrees. Id. The doctor found no definite neurologic deficits or muscle atrophy, and x-rays, SED rate and latex testing for rheumatoid arthritis were normal (TR 892).

In January 1991, Dr. Sutton found that Plaintiff had good grip strength and fine motor control of the upper extremities. Plaintiff performed straight leg raising to 80 of 90 degrees (TR 951). He found that Plaintiff had satisfactory strength and muscle control and a normal gait. Dr. Sutton reported that Plaintiff moaned and groaned with all movements, but that he saw her walk to her car at normal speed, enter her car without difficulty and drive off. Id. He believed that Plaintiff's complaints were entirely subjective and not accompanied by significant medical findings. Id.

The medical expert, Dr. Nelson, testified that all Plaintiff's test results appear to be within normal limits (TR 784). He stated that myofaceitis, with which Plaintiff was diagnosed, is a diagnosis usually given when there are no significant abnormalities in laboratory studies but the patient has subjective complaints (TR 783-4). He stated that this pain is real to the patient, but that rest and inactivity are unnecessary as a treatment. Instead, increased physical activity and exercising often are prescribed as treatment (TR 791). He saw nothing in Plaintiff's medical records or history to confirm a diagnosis of Lupus (TR 784). He also stated that Plaintiff's only apparent physical limitations were in her lower back, which showed signs of limited movement.

The ALJ accepted that Plaintiff had myofaceitis, or fibrositis (TR 709-10). "[T]he question now becomes how much of an impairment to claimant's ability to perform substantial gainful activity is the myofaceitis" or fibrositis. Id. The ALJ found that there appeared to be "very little functional impairment" suffered by Plaintiff (TR 711). The Court finds there is substantial evidence in the record to support the ALJ on this matter.

Plaintiff's third argument is that the ALJ did not properly evaluate her claim that the pain she suffers is disabling. "Subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988). Also, Plaintiff's subjective statements cannot take precedence over conflicting objective evidence. Williams, 844 F.2d at 755.

The ALJ considered all the evidence and the factors for evaluating subjective pain set forth in Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987), and concluded that Plaintiff's pain was not disabling. The ALJ stated that objective medical evidence showed no underlying medical condition so severe as to produce severe, disabling pain. In addition, Plaintiff's activities are inconsistent with a claim of incapacitating pain. Plaintiff stated that she performs light duties around her house. She said that she washes dishes, works crossword puzzles, reads, walks around the

yard twice a week, watches television, sits in church three times a week for two hours each time, goes shopping with friends and occasionally drives a car (TR 590). Plaintiff also testified that she eventually gets relief from Feldene, which lasts until the time she had to take her next pill (TR 826). She testified that she walks one mile for exercise (on a "good" day), and that, as of 1991, she no longer has wrist problems (TR 827-8, 845).

The ALJ also found Plaintiff to have a credibility problem. He found Plaintiff's claim of pain to be "highly exaggerated" (TR 721). He noted Dr. Sutton's observation of Plaintiff easily walking to her car and getting in with no apparent problems (TR 715). The ALJ also observed that Plaintiff had no apparent problems sitting through the administrative hearing, which lasted over an hour. Id. This, he said, contradicted Plaintiff's statements that she could sit for only 10 to 15 minutes. Id. He found that "[h]er testifmony flies in the face of almost all medical evidence." Id. As stated previously, determining the credibility of witnesses is solely with the province of the ALJ, so the Court does not disturb this finding.

In addition, the record shows that Plaintiff said she got relief with medication and treatment such as massages and rest (TR 826, 847-8, 976-7, 981). She also stated that using a rib brace largely relieved her back pain (TR 922, 927), and that she could sit for prolonged periods while using an orthopedic pillow (TR 801). An impairment that can reasonably be controlled with treatment is not disabling. Pacheco v. Sullivan, 932 F.2d 695, 698

(10th Cir. 1991).

Plaintiff's fifth argument for reversal states that diagnosis of fibrositis constitutes new and material evidence that prevents res judicata from being applied to the first and second ALJ decisions (rendered on August 24, 1984, and March 19, 1986). The ALJ applied res judicata to dismiss the claim as it applies to any period on or prior to March 19, 1986, the date this claim was filed. Because Plaintiff has not claimed that this action violated her constitutional rights, this Court has no jurisdiction to reopen these claims. A federal court has no jurisdiction to reopen a claim for disability benefits or determination that such claim is res judicata. Califano v. Sanders, 430 U.S. 99, 107-8 (1977). "The Secretary's decision not to reopen a previously adjudicated claim for benefits is discretionary and, therefore, is not a final decision reviewable under 42 U.S.C. § 405(g)." Brown v. Sullivan, 912 F.2d 1194, 1196 (10th Cir. 1990).

Even if the Court could reopen these claims, the new diagnosis of Plaintiff's fibrositis would not change the outcome since, at the time, Plaintiff was not found to be disabled. "It is true that a treating physician may provide a retrospective diagnosis of a claimant's condition ... However, the relevant analysis is whether the claimant was actually *disabled* ..." Potter v. Secretary of Health & Human Services, 905 F.2d 1346 (10th Cir. 1990) (emphasis in original). Since a determination was made that Plaintiff was not disabled at the time, a diagnosis will not change that fact now.

After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings that Plaintiff's impairment does not prevent her from performing her past relevant work. The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991). Although there is one doctor who stated that Plaintiff is totally disabled, there certainly is substantial evidence to support the ALJ's finding that Plaintiff is able to perform her past relevant work.

There appears to be little doubt that Plaintiff suffers from some pain. However, she has indicated that with treatment, such as painkillers, a rib brace and an orthopedic pillow, she can relieve this pain. This Court finds that there is sufficient relevant evidence in the record to support the ALJ's ruling that Plaintiff is able to perform her past relevant work. The Secretary's decision, therefore, is hereby AFFIRMED.

IT IS SO ORDERED THIS 19th DAY OF SEPTEMBER, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KIRK ADAM PALSGROVE,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

No. 92-C-637-E

ORDER

COMES NOW BEFORE THE COURT FOR CONSIDERATION Defendant's Motion to Dismiss (docket #9), converted by the Court to a motion for summary judgment. Plaintiff's suit arises from Plaintiff's denied request for a religious exemption from the Oklahoma Department of Corrections. Plaintiff has challenged the constitutionality of the Department's grooming code religious exemptions policy. That policy was reviewed by the Department following the decision in Lefors v. Maynard, et al., CIV-91-1521-R (W.D. Okl.). The Department has eliminated all religious exemptions to the grooming code. Thus, Plaintiff's claim is moot, because Plaintiff cannot challenge the Department's refusal to grant him a religious exemption when religious exemptions no longer exist.

IT IS THEREFORE ORDERED that Plaintiff's Complaint is moot, and the case is DISMISSED. IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (docket #9) is DENIED as moot.

SO ORDERED this 19th day of September, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 9-19-94

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICK BROWNING,)
)
Plaintiff,)
)
vs.) Case No. 92-C-873-B
)
DONNA SHALALA, SECRETARY OF)
HEALTH AND HUMAN SERVICES,)
)
Defendant.)

O R D E R

Before the Court for consideration is Plaintiff Rick Browning's appeal (Docket #3), pursuant to 42 U.S.C. § 405(g), of the Administrative Law Judge's ("ALJ's") denial of Social Security benefits.

Plaintiff was born in 1956 with a birth defect affecting his spine. He underwent back surgery in his late teens, and has repeatedly reported being in chronic pain because of his back. He applied for Title II disability insurance benefits and Supplemental Security Income on August 26, 1986, and May 25, 1988, but both applications were denied. He did not appeal. He again applied on March 13, 1989, and ultimately was denied on November 18, 1991, after the case was remanded once to the ALJ for further consideration. Plaintiff then filed this appeal on October 7, 1992.

Plaintiff asserts the following grounds for reversing the ALJ's denial of benefits: that the ALJ did not give substantial weight to the opinion of Plaintiff's treating physician, that the

ALJ failed to evaluate properly the factors set out in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987), which are used to evaluate a claimant's complaints of pain; and that the ALJ mischaracterized the vocational evidence.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id. § 423 (d)(1)(A). An individual

> shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

Id. § 423(d)(2)(A).

Under the Social Security Act, claimants bear the burden of proving a disability, as defined by the Act, which prevents them from engaging in their prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that the jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988);

Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant evidence "that a reasonable mind might accept to support the conclusion." Campbell, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

> is not merely a quantitative exercise. Evidence is not substantial "if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985), *quoting* Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985). Thus, if the claimant establishes a disability, the Secretary's denial of disability benefits, based on the claimant's ability to do other work activity for which jobs exist in the national economy, must be supported by substantial evidence.

The Secretary has established a five-step process for evaluating a disability claim. *See* Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes, 845 F.2d at 243, proceed as follows:

(1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).

(2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).

(3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).

(4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).

(5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If, at any point in the process, the Secretary finds that a person is disabled or not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 416.920. In this case, the ALJ entered a decision at the fifth level of the inquiry, finding that Plaintiff can perform sedentary work available in the national economy.

After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings that Plaintiff's impairment does not prevent him from performing sedentary work. The Court determined that the record, when taken as a whole, does support the ALJ's conclusion. The Court does not interpose its judgment for that of the ALJ. The following is a brief summary of some of the relevant medical evidence presented to the ALJ.

The first reported treatment, by Dr. Pryor in May 1986, found the lumbar spine had some motion limitation, but found no evidence of muscle weakness, sensory deficit or spasticity in the lower extremities. Gait and heel and toe walk were normal. X-rays indicated spondylolisthesis (forward displacement of vertebra over another) at L5-S1, the site of the surgery that was done when Plaintiff was a teen-ager. Dr. Pryor prescribed anti-inflammatory medicine and back exercises. He recommended that Plaintiff avoid repetitive bending, twisting, and lifting over 50 pounds. (TR 397).

In addition, a 1986 consultative examination by Dr. Thomas-Richards was consistent with these findings (TR 407-410). Dr. Thomas-Richards found that Plaintiff could sit for over seven hours, and stand and walk for five to six hours. The doctor said Plaintiff should be restricted from jobs that would require rotating, twisting and bending his spine, and from performing jobs that require repetitive foot movements. The doctor stated that Plaintiff should not lift more than 40-45 pounds. Id.

Plaintiff next sought treatment in May 1988 from Dr. Smallwood at the Adult Medicine Clinic ("Clinic"). Dr. Smallwood's findings were consistent with the previous diagnoses. Plaintiff's range of back motion was found to be good. EMG findings suggested denervation changes on the left side at L5-S1, but there was no evidence of acute radiculopathy. Plaintiff was able to walk on his toes and heels and squat. He also told Dr. Smallwood that his back pain improved with exercise (TR 430-37).

Plaintiff again went to the Clinic in August 1988, and was

treated by Dr. Ritchey, whom Plaintiff states is his attending physician. She treated him from August 1988 to November 1988. Dr. Ritchey's written report, dated September 20, 1988, stated that Plaintiff had severe lower back pain and that the condition prohibited him from performing manual labor and extensive physical activity, and that sitting or standing in one position for more than a few minutes was very uncomfortable. She also stated that Plaintiff was unable to work at that time (TR 469). She found some restriction of back motion, with mild tenderness and no significant neurological deficit. Tests revealed spondylolisthesis and marked degenerative disc disease at L5-S1.

Dr. Ritchey referred Plaintiff to Dr. Richter for neurological evaluation in September 1988. Dr. Richter found no evidence of progressive neurological change, nor abnormality in motor and sensory nerve conduction. He found no muscle atrophy in the lower extremities. He found that Plaintiff had very good muscle volume and could walk well on his heels and toes (TR 466).

Plaintiff sought treatment at the Clinic again in October 1989, September 1990, October 1990 and June 1991. Each treatment found restriction on Plaintiff's range of back motion, but found no significant neurological defect. The doctors found that Plaintiff could walk on his toes, and there was no overt evidence of herniation (TR 488, 496, 501-03). One doctor stated that Plaintiff should not have a job that required physical activity (TR 498-9). Plaintiff was treated with Tylenol and Motrin.

Plaintiff alleges that the ALJ did not give proper weight to

the report of the treating physician, Dr. Ritchey. The ALJ can decide to believe all or any portion of any witness's testimony or evidence. The ALJ found Dr. Ritchey's opinion to be inconsistent with the medical record. Determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams v. Bowen, 844 F.2d 748, 755 (10th Cir. 1988). There was ample evidence to support the ALJ's findings. The ALJ agreed that Plaintiff was unable to endure strenuous physical activity, as Dr. Ritchey stated. However, Dr. Ritchey does not address whether Plaintiff could perform sedentary employment tasks.

Plaintiff also contends that the ALJ misapplied the standards set down in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987), for evaluating a claimant's subjective allegations of pain. "If an impairment is reasonably expected to produce *some* pain, allegations of *disabling* pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Id. at 164 (emphasis in original). However, "[s]ubjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988). Also, Plaintiff's subjective statements cannot take precedence over conflicting objective evidence. Williams, 844 F.2d at 755. Even considering Plaintiff's allegations of disabling pain, the ALJ relied on the record as a whole to determine that Plaintiff could

perform sedentary work.

The ALJ obviously considered Plaintiff's allegations of pain. He stated that, based upon the medical information, "the [ALJ] is convinced that claimant is physically unable to do greater than sedentary work activity" (TR 38). He noted, however, there was no medical evidence that stated Plaintiff could not do sedentary work. Id. Luna requires that the ALJ consider both objective evidence and the claimant's allegation of the extent of pain suffered.

There is little doubt that Plaintiff indeed suffers back pain, and that there is a physical basis for that pain. The ALJ noted this fact (TR 38). The question here, however, is whether the pain suffered is such that Plaintiff could not perform sedentary work tasks. The ALJ determined, as adjudicator of the facts in this case, that it was not. The ALJ found that, however, Plaintiff could not perform the full range of sedentary jobs available due to Plaintiff's additional nonexertional limitations (TR 44).

The medical evidence supports the ALJ's conclusion. There is no evidence of significant muscular weakness, sensory loss or physical deterioration. Heel and toe walking and gait were shown to be normal. There was no evidence of significant muscle spasm or atrophy (TR 397, 408, 436, 466, 475, 498, 501). CT scans, myelograms and x-rays indicated no worsening of Plaintiff's condition, and some physicians stated that Plaintiff was able to perform work-related activities (TR 399, 402, 428, 432, 438, 463-5). Several doctors believed that Plaintiff could work (TR 392, 409). It is not the duty of this Court to reweigh the evidence or

substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991).

Plaintiff also alleges that the jobs that the ALJ found Plaintiff could perform do not meet the significant numbers criterion. The Tenth Circuit in Trimiar v. Sullivan, 966 F.2d 1326 (10th Cir. 1992), outlined the criteria necessary to determine whether a job exists in significant numbers. In Trimiar, the court stated there is no bright-line test to determine a "significant number" of jobs. Instead, individual cases are evaluated on their own merits. Id. at 1330. Factors to consider include: the level of claimant's disability; reliability of the vocational expert's testimony; the distance claimant is capable of travelling to engage in the assigned work; the isolated nature of the job; and the types and availability of such work. Id.

The vocational expert testified that there are about 1,900 jobs in the local economy and 176,000 jobs in the national economy that Plaintiff, with his physical limitations, could perform (TR 139). However, this does not consider Plaintiff's mental state, which requires that he have a job that is simple, repetitive and with minimal supervisory interplay (TR 42). When adding this factor, the vocational expert estimated that about 10 percent of the 1,900 local jobs meet Plaintiff's requirements (TR 139).

The ALJ, however, used the figure of 1,900 local jobs instead of 190 in finding that there are significant numbers of jobs in the regional economy (TR 44). The findings of the Secretary as to any

fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). However, the ALJ apparently used an erroneous figure in determining whether there are a significant number of jobs in the national and local economy for Plaintiff.

This Court finds that there is sufficient relevant evidence in the record to support the ALJ's ruling that Plaintiff is able to perform some sedentary work only. However, there remains a question as to whether there are a "significant" number of appropriate jobs, when considering the correct number estimated by the vocational expert. Therefore, the Court hereby REMANDS the case solely for a determination, in accordance with Trimiar v. Sullivan, of whether the number of jobs in the economy that Plaintiff could perform is significant, thereby necessitating a denial of benefits.

IT IS SO ORDERED THIS 19th DAY OF SEPTEMBER, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HARRY E. GOUGH, JR.,

Plaintiff,

vs.

Case No. 93-C-221-B

DONNA SHALALA,
Secretary of Health and
Human Services,

Defendant.

ORDER

This matter comes on for consideration of Plaintiff Harry E. Gough, Jr.'s (Gough) Complaint seeking judicial review of the final decision of the Secretary of Health and Human Services (Secretary) denying Plaintiff's application for disability insurance benefits under the Social Security Act, as amended, 42 U.S.C. § 301 *et seq*.

Plaintiff filed an application for social security disability benefits (hereinafter "benefits") with the Defendant on September 21, 1990. Plaintiff's application was denied initially and denied again upon reconsideration. After an administrative hearing, the Administrative Law Judge (ALJ) issued a denial Decision and the Appeals Council denied the Plaintiff's request for review on January 27, 1993.

The Plaintiff filed this action on March 15, 1993, pursuant to 42 U.S.C. §405(g), seeking judicial review of the administrative

decision to deny benefits under §§216(i) and 223 of the Social Security Act. Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The Court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decision. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 [1938]). In deciding whether the Secretary's findings are supported by substantial evidence, the Court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir.1978).

Plaintiff contends "that his medical records and his testimony supports his assertion that he is unable to engage in substantial gainful activity and is therefore disabled pursuant to the Social Security Regulations." Plaintiff further argues that the evidence in the record establishes that he suffers from a severe brain tumor and has numerous side effects from his medications; that the ALJ's decision that Plaintiff can perform heavy work is not supported by substantial evidence.

Defendant argues that Plaintiff's grounds for reversal of the decision to deny Plaintiff benefits may be summarized as follows:

> 1) The ALJ should have found Plaintiff disabled within the meaning of the Social Security Act since his insurance company found that he was disabled.
>
> 2) Plaintiff's non-exertional impairments of dizziness, side effects from medication and lack of energy preclude reliance on the "grids".

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id. §423(d)(1)(A). An individual

> "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

Id. § 423(d)(2)(A).

The Secretary has established a five-step process for evaluating a disability claim. *See,* Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987); Talbot v. Heckler, 814 F2d 1456 (10th Cir.1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir.1983); and Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988). The five steps, as set forth in the authorities above cited, proceed as follows:

(1) Is the claimant currently working? A person who is working is not disabled. 20 C.F.R. § 416.920(b).

(2) If claimant is not working, does the claimant have a severe impairment? A person who does not have an impairment or combination of impairments severe enough to limit his or her ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).

(3) If the claimant has a severe impairment, does it meet or equal an impairment listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1. A person whose impairment meets or equals one of the impairments listed therein is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).

(4) Does the impairment prevent the claimant from doing past relevant work? A person who is able to perform work he or she has done in the past is not disabled. 20 C.F.R. § 416.920(e).

(5) Does claimant's impairment prevent him or her from doing any other relevant work available in the national economy? A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If at any point in the process the Secretary find that a person is disabled or not disabled, the review ends. Reyes, at 243; Talbot v. Heckler, at 1460; 20 C.F.R. § 416.920.

The ALJ followed the five-step approach set forth above and concluded:

1) That plaintiff was not presently engaged in substantial gainful activity;

2) That plaintiff has a "severe" impairment, a diagnosis of prolactinoma which is a brain tumor;

3) That plaintiff's severe impairment does not meet or equal an impairment or impairments in Appendix 1, Subpart P, Regulations No.4;

4) That plaintiff could not perform his past relevant work, i.e. a painter which involved walking/standing up to seven hours a day, with sitting up to two hours a day all of which involves work at the very heavy exertional level;

5) That plaintiff retains the residual functional capacity for a full range of heavy work and that a significant number of heavy work jobs in the national economy exists;

The ALJ found that plaintiff is a 48 year old which is defined as a young person (20 CFR 404.1563); that according to the progress notes of Dr. Marple (Exhibit B-19) plaintiff has had a known pituitary tumor since 1985, symptomatically controlled by the drug Parlodel; that plaintiff's last MRI brain scan had been in April, 1989, which resulted in Dr. Marple's conclusion that plaintiff's tumor involvement of the right half of the pituitary was unchanged from an MRI brain scan in July 1988; that plaintiff's prolactinoma was regarded as medically controlled based on no changes in the MRI scan; that plaintiff was diagnosed with Bell's palsy related to his persistent stable left facial weakness; that plaintiff's Bell's palsy was showing signs of improvement; that plaintiff's prolactin level was noted to have increased and that the claimant had occasional difficulty maintaining an erection and admitted to "mild depression"; that plaintiff currently did housework and cared for his young children.

Dr. Marple further reported that plaintiff had mildly elevated blood pressure, ate an average salt diet and did not exercise regularly; that plaintiff had a several month history of recurrent lower chest pain, described as "like heartburn and gas" which occurred shortly after plaintiff ate especially spicy or greasy foods; that plaintiff, by phone in December 1990, asked Dr. Marple to prescribe a "nerve pill" as a result of the death of the plaintiff's uncle to whom the plaintiff was very close.

Dr. Calhoun's consultative examination in January, 1991,

(Exhibit B-20) closely mirrored Dr. Marple's conclusions; that plaintiff opined to Dr. Calhoun that he was disabled due to a brain tumor; that Dr. Calhoun noted "The tumor basically has affected only his erectile functioning, such that he has very poor ability to maintain an erection even on medication"; that plaintiff reported he had some occasional headaches but no other neurologic symptoms from the tumor itself; that the drug Parlodel upset his stomach "slightly"; that plaintiff was living at home with his wife and family and was able to do most of the work around the house and activities of daily living; that plaintiff was basically a taxi driver for his wife, children and grandchildren on an almost daily basis; that plaintiff had occasional headaches, occurring about one a month, relieved by Flexeril and over-the-counter analgesics; that plaintiff's Bell's palsy had largely resolved; that plaintiff reportedly took medication for "some mild degenerative joint disease"; that examination of the peripheral joints revealed no evidence of acute or chronic arthritic changes for joint deformities, with joint motion and the range of joint motion being grossly normal; that Dr. Calhoun found no significant joint deformities, redness, swelling, heat or tenderness, with gross and fine manipulative abilities of both hands being normal as was grip strength; that gait in terms of speed, stability and safety were normal as was plaintiff's mental status.

At the hearing before the ALJ plaintiff testified that he had no problem driving having driven in October, 1989, to Chicago when his father died and has driven to Wichita, Kansas and Oklahoma City

several times and drives to Muskogee once or twice a month; that he takes his wife to work every morning and his children to school; that he spends up to an hour cleaning house, washes dishes, vacuums and cuts the grass; that he likes to shoot pool; that he is disabled because of his brain tumor for which he takes medication three times a day and has a dizzy spell lasting an hour every time he takes the pills; that because of the brain tumor he forgets what he is doing and needs to write things down to remember; that he has blurred vision one to two times a month, lasting from 30 minutes to an hour when he cannot drive and must lie down; that he could walk a quarter of a mile, stand 30 minutes before tiring, sit 30 minutes to an hour before his back hurts, and lift 30 to 40 pounds.

Upon examination by his attorney plaintiff stated the tumor leaves him nauseated and with little energy; that he is unable to climb a ladder and fell because of his dizziness; that he can only raise his arms up 45 degrees because of paralysis which resulted when plaintiff injured himself falling at work in June 1986.

The ALJ contrasted plaintiff's disability benefits application of January 1991 with his testimony at the hearing and determined that in the former plaintiff stated he did spend approximately 2 and 1/2 hours each day doing housework not counting preparation of meals or shopping which plaintiff also does; that plaintiff likes to play pool and basketball spending up to 2 and 1/2 hours on the former and one hour on the latter at a time. The AlJ concluded that plaintiff's testimony that he had blurred vision once or twice a month, lasting one-half of one hour at a time was not substantiated

by the medical evidence. The ALJ further concludes that plaintiff's allegations of low energy level and mild degenerative joint disease, were also not substantiated by the medical evidence.

The ALJ found that plaintiff's subjective complaints of pain, dizziness, nausea, forgetfulness and blurred vision were not of such intensity, frequency and duration as to affect his concentration or prevent the performance of work activity at a heavy exertional level, specifically finding that: "To the extent that the claimant's testimony tends to show otherwise, such testimony in light of all other evidence, including the medical exhibits, is deemed not sufficiently credible to support a finding of disability under current criteria."

The Secretary's findings stand if such findings are supported by substantial evidence, considering the record as a whole. Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, at 1521.

The Plaintiff has the burden to show that he is unable to return to the prior work he performed. Bernal, at 299, a conclusion reached by the ALJ herein. Further, the Plaintiff has the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577 (10th Cir.1984).

The Plaintiff's argument for reversal is based upon the ALJ's evaluation of the evidence. Plaintiff contends that there was not substantial evidence to support the ALJ's findings, that the ALJ improperly weighed the evidence of treating physicians and that the ALJ improperly evaluated the credibility of the Plaintiff.

After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings that Plaintiff's impairment does prevent him from performing his past relevant work. However, the ALJ found that plaintiff retains the residual functional capacity for a full range of heavy work and that a significant number of heavy work jobs in the national economy exists, a conclusion supported by the record herein.

The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. §405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991).

Determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams v. Bowen, 844 F.2d 748, 755 (10th Cir. 1988). The ALJ can decide to believe all or any portion of any witness's testimony or evidence. In this case, the ALJ found the opinions of Dr. Marple and Dr. Calhoun to be credible and to amount to substantial evidence.

An issue arguably exists whether the ALJ properly evaluated

plaintiff's claim that the pain he was suffering was disabling. The ALJ found that Plaintiff's testimony as to pain was not credible and that his pain was not disabling.

The Tenth Circuit has held that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988).

The ALJ considered all the evidence and the factors for evaluating subjective pain set forth in Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987), and concluded Plaintiff's pain was not disabling. The ALJ stated that the objective medical evidence showed no underlying medical condition so severe as to produce severe, disabling pain (TR 18). In addition, the ALJ noted that claimant's daily activities included daily housework, chauffeuring of family and sports activities. Such activities are inconsistent with a claim of incapacitating pain.

Substantial evidence supports the ALJ's conclusion that Plaintiff's allegations of pain were not credible to the extent that they precluded performing a full range of heavy work.

This Court finds that there is sufficient relevant evidence in the record to support the ALJ's ruling that the Plaintiff is able to perform a full range of heavy work. The Secretary's decision is, therefore, AFFIRMED.

IT IS SO ORDERED THIS 19th DAY OF September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

REAL PROPERTY KNOWN AS: 232 and 234 MELTON ROAD, LIBERTY, PICKENS COUNTY, SOUTH CAROLINA, AND ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON;

and

REAL PROPERTY KNOWN AS: 909 NORRIS DRIVE, LIBERTY, PICKENS COUNTY, SOUTH CAROLINA, AND ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON;

and

REAL PROPERTY KNOWN AS: 5861 McLEOD DRIVE, LAS VEGAS, CLARK COUNTY, NEVADA, AND ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON;

and

THE SUM OF ONE HUNDRED THIRTY THOUSAND THIRTY DOLLARS ($100,030.00) IN UNITED STATES CURRENCY;

and

ONE 1982 MERCEDES BENZ, VIN WDBBA45A2CB015752,

Defendants.

CIVIL ACTION NO. 94-C-85-B

JUDGMENT OF FORFEITURE
OF $100,030 IN UNITED STATES CURRENCY

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture by Default and by Stipulation as to the $100,030 defendant currency and all entities and/or persons interested in the $100,030 defendant currency, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 31st day of January 1994, alleging that the defendant currency was subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6), because it was furnished or intended to be furnished in exchange for a controlled substance, or is proceeds traceable to such an exchange, and subject to seizure and forfeiture to the United States.

Warrant of Arrest and Notice In Rem was issued on the 31st day of January 1994, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant currency and for publication in the Middle District of Florida.

On the 5th day of July 1994, the United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the defendant currency.

James H. Van Over and Betty M. Van Over were determined to be the only potential claimants in this action with possible standing to file claims to the defendant currency. Both James H.

Van Over and Betty M. Van Over executed a Stipulation for Forfeiture of certain real and personal property, including, but not limited to the defendant $100,030 in United States currency. Both Stipulations for Forfeiture are on file herein.

USMS 285s reflecting the service upon the defendant currency and all known potential claimants are on file herein.

All persons or entities interested in the defendant currency were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No other persons or entities upon whom service was effected more than thirty (30) days ago have filed a Claim, Answer, or other response or defense herein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in The Tampa Tribune, Tampa, FLorida, a newspaper of general circulation in the Middle District of Florida, the district in which the defendant currency was seized, on July 16, 23, and 30th, 1994. Proof of Publication was filed August 15, 1994.

No other claims in respect to the $100,030 defendant currency have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant currency, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the $100,030 defendant currency, and all persons and/or entities interested therein, except James H. Van Over and Betty M. Van Over who have agreed to the forfeiture of the defendant currency by virtue of their Stipulations for Forfeiture on file herein.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant currency:

THE SUM OF ONE HUNDRED THOUSAND THIRTY DOLLARS ($100,030.00) IN UNITED STATES CURRENCY,

which was erroneously described in the style of this action as One Hundred Thirty Thousand Thirty Dollars ($100,030.00) be, and it hereby is, forfeited to the United States of America for disposition according to law.

Entered this 16th day of September 1994.

S/ THOMAS R. BRETT

THOMAS R. BRETT
United States District Judge

APPROVED:

CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\CHOOK\FC\VANOV(ER)13\04177

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TAYLOE PAPER COMPANY, Plaintiff,	)	Case No. 94-C-174B
v.	)	
HARTFORD CASUALTY INSURANCE COMPANY, Defendant.	)	ENTE... DAT...

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 16th day of Sept., 1994, it appearing to the Court that this matter has been compromised and settled in full, this case is hereby dismissed with prejudice to the refiling of any future action.

S/ TH...

Judge ~~Magistrate~~ of the District Court
of the Northern District

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARRIOTT CORPORATION	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 93-C-330-B
	)	
	)	
HILLCREST MEDICAL CENTER	)	
	)	
Defendant.	)	

JUDGMENT CONFIRMING ARBITRATION AWARD

Pursuant to the Court's Order of September 16th 1994, granting the Motion of Marriott Corporation to Confirm Arbitration Award filed August 19, 1994, the Court hereby enters judgment in favor Marriott Corporation and against Hillcrest Medical Center confirming the Arbitration Award in favor of Marriott Corporation and against Hillcrest Medical Center.

Dated this 16th day of September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

James M. Sturdivant, Esq.
Timothy A. Carney, Esq.
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2000 Bank IV Center
Tulsa, Oklahoma 74119
(918) 582-9201

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ALFREDA ATKINS,	
Plaintiff,	**STATEMENT OF OBJECTION** Opposing counsel *does not object* to this motion.
vs.	
DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,	
Defendant.	**CASE NO. 94-C-10-E**

ORDER

Upon the motion of the defendant, Secretary of Health and Human Services, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Secretary for further administrative proceedings.

DATED this 16th day of September, 1994.

/S/ JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES ~~DISTRICT~~ JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, OK 74103-3809
(918) 581-7463

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JANIE BOEHNE,

Plaintiff,

vs.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 92-C-1135-B

O R D E R

Before the Court for consideration is Plaintiff Janie Boehne's appeal (Docket #1), pursuant to 42 U.S.C. § 405(g), of the Administrative Law Judge's ("ALJ's") denial of Social Security benefits. This claim is based on complaints of back pain, leg pain and depression.

Plaintiff applied for Title II disability insurance benefits on June 29, 1990, stating that she had been disabled since February 1, 1990, due to a work-related back injury. The ALJ denied benefits on February 10, 1992, and the Appeals Council concurred. Plaintiff now seeks judicial review.

Plaintiff asserts the following grounds for reversing the ALJ's denial of benefits: that the ALJ did not properly consider the opinions of Plaintiff's treating physicians and the consultative examiners, most notably a Dr. Klontz; and that the ALJ failed to evaluate properly the factors set out in Luna v. Bowden, 834 F.2d 161 (10th Cir. 1987), used to evaluate a claimant's complaints of pain.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id. § 423 (d)(1)(A). An individual

> shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

Id. § 423(d)(2)(A).

Under the Social Security Act, claimants bear the burden of proving a disability, as defined by the Act, which prevents them from engaging in their prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that the jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. Campbell v. Bowen, 822 F.2d 1518, 1521

(10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant evidence "that a reasonable mind might accept to support the conclusion." Campbell, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

> is not merely a quantitative exercise. Evidence is not substantial "if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985), *quoting* Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985). Thus, if the claimant establishes a disability, the Secretary's denial of disability benefits, based on the claimant's ability to do other work activity for which jobs exist in the national economy, must be supported by substantial evidence.

The Secretary has established a five-step process for evaluating a disability claim. *See* Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes, 845 F.2d at 243, proceed as follows:

(1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).

(2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).

(3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app.

1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).

(4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).

(5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If, at any point in the process, the Secretary finds that a person is disabled or not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 416.920.

In this case, the ALJ entered a decision at the fifth level of the inquiry, finding that, while Plaintiff's condition precluded her from returning to her previous job, it did not prevent her from working entirely. "Although the claimant's additional nonexertional limitations do not allow her to perform the full range of sedentary and light work, ... there are a significant number of jobs in the national economy which she could perform." (TR 27). Therefore, the ALJ determined that Plaintiff is not "disabled" within the meaning of the Social Security Act.

Plaintiff alleges that the opinions of the treating physicians and consultative examiners, particularly that of Dr. Klontz, were not considered properly by the ALJ. Dr. Klontz, who conducted a consultative psychiatric examination, found that Plaintiff described classic symptoms of depression. Dr. Klontz found that

Plaintiff's mental status examinations showed no abnormalities of thought process, that she was fully oriented and had no memory or recall abnormalities. He determined that Plaintiff had a depressive disorder, secondary to chronic pain syndrome. He found that she had the capacity to understand and follow instructions, and manage her own financial affairs. He also found, however, that she probably did not have the emotional ability to relate to fellow workers or supervisors, to maintain the attention span necessary to perform work-type tasks, or the ability to withstand the day-to-day stress of work activity (TR 230-232).

Dr. Goldman, a medical expert, disagreed with the extent of limitation diagnosed by Dr. Klontz. Dr. Goldman stated that Plaintiff was actively engaged in a college-level degree program (taking 16 hours in one semester), which is inconsistent with Dr. Klontz's claim that she had lost interest in all activities (TR 70). He stated that her weight gain was attributable to antidepressant medication, and there is no documented evidence that Plaintiff would have trouble dealing with work relationships (TR 72).

The ALJ can decide to believe all or any portion of any witness's testimony or evidence. The ALJ found Dr. Klontz's opinion to be inconsistent with the medical record and with the medical expert, Dr. Goldman. Determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams v. Bowen, 844 F.2d 748, 755 (10th Cir. 1988).

Plaintiff also contends that the ALJ misapplied the standards

set down in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987), for evaluating a claimant's subjective allegations of pain. "If an impairment is reasonably expected to produce *some* pain, allegations of *disabling* pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Id. at 164 (emphasis in original). However, "[s]ubjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988). Also, Plaintiff's subjective statements cannot take precedence over conflicting objective evidence. Williams, 844 F.2d at 755. Even considering Plaintiff's allegations of disabling pain, the ALJ relied on additional other evidence to determine that Plaintiff could perform light duty work.

After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings that Plaintiff's impairment does not prevent her from performing light-duty work. The following is a brief summary of some of the relevant medical evidence presented to the ALJ.

After injuring her back while working as a nurse, Plaintiff was hospitalized in 1988, diagnosed as having lumbosacral paraspinal muscle strain. In 1990, she lost control of her left leg, had foot drop, and was hospitalized again. She testifies that, when she tires, the still leg goes numb and loses reflexes

(TR 51).

Since her injury, Plaintiff has become a full-time college student, working on her bachelor's degree. Plaintiff testified that she regularly attends college, does light housekeeping and cooks. She drives to school daily (about 30 minutes each way), and drives 60 miles once a month to visit her mother. In addition, the ALJ found no evidence of significant side effects to her pain medication (TR 41-66, 71-72, 124). Her pain medication was described by Dr. Goldman as being the "ordinary" medication for back pain, commonly taken by many patients and should not restrict her work performance (TR 76).

Dr. Goldman found that Plaintiff had the ability to lift 25 pounds frequently, to sit, stand and walk six to eight hours a day, push and pull, perform fine manipulation, and climb, stoop and bend occasionally (TR 66-78). The ALJ noted that Plaintiff did not allege chronic intractable pain that is disabling, but "instead alleges intermittent severe exacerbations of pain with exertion" (TR 22). He also stated that, "[a]pparently she gets around rather well unless she has the precipitating or aggravating factors of heavy lifting or prolonged sitting or standing." Id.

Dr. Cosby, the consultative medical examiner, found that Plaintiff has significant physical limitations and cannot perform heavy activities, but he did not state that she is unable to perform light-level work activities. His October 1990 examination indicated that Plaintiff had a full range of motion in the lower back, and could bend forward, nearly touching her toes, before

experiencing pain. She could squat and arise without help, and could walk on her heels and toes easily.

In February 1990, x-rays, a myelogram and CT scan of the lumbar spine were normal except for "very mild" disc bulge at L3-L5, with no evidence of spinal stenosis (TR 215-218). These findings are consistent with tests done in July 1988 and January 1989, which found "minimal" disc protrusion (TR 203).

The ALJ considered this and other medical evidence and concluded that Plaintiff was not disabled. The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991).

This Court finds that there is sufficient relevant evidence in the record to support the ALJ's ruling that Plaintiff is able to perform light-duty work. The Secretary's decision, therefore, is hereby AFFIRMED.

IT IS SO ORDERED THIS 16th DAY OF SEPTEMBER, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARRIOTT CORPORATION	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 93-C-330-B
	)	
	)	
HILLCREST MEDICAL CENTER	)	
	)	
Defendant.	)	SEP 16 1994

ORDER GRANTING MARRIOTT CORPORATION'S
MOTION TO CONFIRM ARBITRATION AWARD

Pursuant to Marriott Corporation's Motion to Confirm Arbitration Award filed on August 19, 1994, the Court hereby grants said Motion in favor of Marriott and against Hillcrest Medical Center.

IT IS SO ORDERED this 16th day of September, 1994.

S/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

James M. Sturdivant, Esq.
Timothy A. Carney, Esq.
GABLE & GOTWALS
2000 Bank IV Center
Tulsa, Oklahoma 74119
(918) 582-9201

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK LEE WYRICK; SHARON KAY WYRICK; WELLS FARGO CREDIT CORPORATION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.) CIVIL ACTION NO. 94-C 213E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day of Sept, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **Wells Fargo Credit Corporation**, appears by its attorney, Kenneth G. Miles; and the Defendants, **Frank Lee Wyrick and Sharon Kay Wyrick**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Wells Fargo Credit Corporation**, was served with Summons and Complaint on April 11, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 14, 1994;

and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 11, 1994.

The Court further finds that the Defendants, **Frank Lee Wyrick and Sharon Kay Wyrick**, were served by publishing notice of this action in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning May 19, 1994, and continuing through June 23, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Frank Lee Wyrick and Sharon Kay Wyrick**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Frank Lee Wyrick and Sharon Kay Wyrick**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis,

United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on March 23, 1994; the Defendant, **Wells Fargo Credit Corporation**, filed its answer on June 21, 1994; and that the Defendants, **Frank Lee Wyrick and Sharon Kay Wyrick**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot Seven (7), Block Seven (7), LAYMAN ACRES, an Addition in Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.**

The Court further finds that on February 21, 1977, Rickey L. Leston and Michele R. Leston, husband and wife, executed and delivered to Mager Mortgage Company their mortgage

note in the amount of $24,700.00, payable in monthly installments, with interest thereon at the rate of eight percent (8%) per annum.

The Court further finds that as security for the payment of the above-described note, Rickey L. Leston and Michele R. Leston, husband and wife, executed and delivered to Mager Mortgage Company a mortgage dated February 21, 1977, covering the above-described property. Said mortgage was recorded on February 24, 1977, in Book 4252, Page 320, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 18, 1990, Brumbaugh & Fulton Company formerly Mager Mortgage Company assigned the above-described mortgage note and mortgage to the Secretary of housing & Urban Development. This Assignment of Mortgage was recorded on October 23, 1990, in Book 5284, Page 631, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Frank Lee Wyrick and Sharon Kay Wyrick, husband and wife, currently hold the fee simple title to the property by virtue of a Special Warranty Deed dated February 6, 1989, and recorded on February 8, 1989 in Book 5165, Page 2282, in the records of Tulsa County, Oklahoma; and the Defendants, Frank Lee Wyrick and Sharon Kay Wyrick, husband and wife, are the current assumptors of the subject indebtedness.

The Court further finds that on November 1, 1990, the Defendants, Frank Lee Wyrick and Sharon Kay Wyrick, entered into an agreement with the Plaintiff lowering the amount of the

monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that on March 6, 1991, the Defendants, Frank Lee Wyrick and Sharon Kay Wyrick filed their voluntary Chapter 7 petition in United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 91-00673C; on June 28, 1991, the personal liability of the Defendants, Frank Lee Wyrick and Sharon Kay Wyrick, on the subject mortgage and note, was discharged, and the case was closed on June 10, 1992.

The Court further finds that the Defendants, Frank Lee Wyrick and Sharon Kay Wyrick, made default under the terms of the aforesaid note and mortgage, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Frank Lee Wyrick and Sharon Kay Wyrick, are** indebted to the Plaintiff in the principal sum of $26,978.00, plus interest at the rate of 8 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $14.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of $28.00, which became a lien as of June 26, 1992; and a claim against the subject property in the amount of $14.00. Said liens and claim

are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Wells Fargo Credit Corporation,** has a lien on the property which is the subject matter of this action by virtue of a second mortgage, dated February 7, 1989, and recorded on February 8, 1989, in Book 5165, page 2284, in the records of Tulsa County, Oklahoma, in the amount of $9,188.11, the principal balance, plus Interest of $3,926.78, from November 7, 1990 to August 11, 1994, at $2.86 per diem, an Escrow Account Shortage of $709.00, Late Charges of $208.00, and Costs of Collection (including attorney fees) in the amount of $1,852.05, representing a total of $15,884.32, plus accruing interest.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claim no right, title or interest in the subject real property

The Court further finds that the Defendants, **Frank Lee Wyrick and Sharon Kay Wyrick, are** in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover

judgment in rem against the Defendants, **Frank Lee Wyrick and Sharon Kay Wyrick**, in the principal sum of $26,978.00, plus interest at the rate of 8 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $56.00 for personal property taxes for the yearS 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Wells Fargo Credit Corporation,** have and recover judgment in the amount of $15,884.32, plus accruing interest, for a second mortgage recorded on February 8, 1989, in Book 5165, Page 2284, in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Frank Lee Wyrick, Sharon Kay Wyrick, and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Frank Lee Wyrick and Sharon Kay Wyrick**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise

and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the Defendant, Wells Fargo Credit Corporation, in the amount of $15,884.32, plus accruing interest, for a second mortgage.

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $62.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession

based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED:

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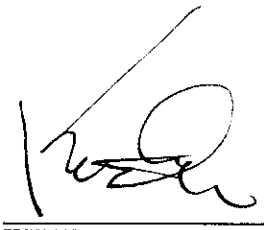

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Judgment of Foreclosure
Civil Action No. 94-C 213E

NBK:lg

FILED

SEP 1 5 1994

Richard M. Lawrence, Clerk
U. S. District Court
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WANDA LANDRUM,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 94 C 335 B**
	)	
NATIONAL UNION FIRE INSURANCE COMPANY,	)	ENTERED ON DOCKET
	)	DATE 9-15-94
Defendants.	)	

ORDER OF REMAND

This matter comes on for hearing on the joint Stipulation of the Plaintiff, Wanda Landrum, and Defendant, National Union Fire Insurance Company, for a remand of the above captioned cause to state court. The Court, being fully advised, having reviewed the Stipulation, finds that the above entitled cause should be remanded to state court based on Plaintiff's admission that the amount in controversy is less than $50,000.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above entitled cause be and is hereby remanded to state court.

Dated this 14th day of September, 1994.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT COURT JUDGE

b:Order.JT/kms

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RICHARD D. OLDEN,)
)
Plaintiff,)
)
v.) Case No. 94-C-206-E
)
SHERIFF STANLEY GLANZ,)
)
Defendant.)

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed April 28, 1994, in which the Magistrate Judge recommended that the case be dismissed since petitioner was no longer a prisoner and no longer restrained of his liberty, his petition was obviously moot. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

IT IS THEREFORE ORDERED that the case is dismissed.

Dated this 15th day of September, 1994.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TULSA DOOR & WINDOW COMPANY,

Plaintiff,

vs.

AMERICAN GENERAL INSURANCE COMPANY, et al.,

Defendants.

Case No. 94-C-106-BU

ORDER

This matter comes before the Court upon the Report and Recommendation issued by United States Magistrate Judge Jeffrey S. Wolfe on August 26, 1994. In the Report and Recommendation, Magistrate Judge Wolfe advised Plaintiff of its right to object to the Report and Recommendation within ten (10) days of receipt of the Report and Recommendation. The Court file reflects that Plaintiff has not filed an objection to Magistrate Judge Wolfe's Report and Recommendation. In accordance with 28 U.S.C. § 636(b), the Court has conducted a de novo review of this matter. Having done so, the Court agrees with the findings and recommendation of Magistrate Judge Wolfe and adopts Magistrate Judge Wolfe's Report and Recommendation in its entirety.

Accordingly, the Court hereby DISMISSES WITHOUT PREJUDICE the plaintiff's complaint against the defendants.

ENTERED this 14th day of September, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. STEVEN JAY LAMBERT; CAROL ANN LAMBERT; FLEET REAL ESTATE FUNDING CORP.; CITY OF BROKEN ARROW, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	FILED SEP 14 1994 Richard M. Lawrence, Clerk U.S. DISTRICT COURT CIVIL ACTION NO. 94-C 319B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14th day of Sept., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **Steven Jay Lambert and Carol Ann Lambert,** appear by their attorney Larry D. Thomas; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **City of Broken Arrow, Oklahoma,** appears by its attorney Michael Vanderburg; and the Defendant, **Fleet Real Estates Funding Corp.**, appears not, but should be dismissed.

The Court being fully advised and having examined the court file finds that the Defendants, **Steven Jay Lambert and Carol Ann Lambert**, acknowledged receipt of Summons and Complaint on April 19, 1994; that the **Defendant, City of Broken Arrow,**

acknowledged receipt of Summons and Complaint on April 9, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on April 8, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on April 4, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on April 25, 1994; that the Defendants, **Steven Jay Lambert and Carol Ann Lambert**, filed their Answer on May 25, 1994; that the Defendant, **City of Broken Arrow, Oklahoma**, filed its Answer on May 4, 1994; and that the Defendant, **Fleet Real Estate Funding Corp.**, filed a Quitclaim Deed, and should be dismissed from this action.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot Five (5), Block Ten (10), WINDSOR ESTATES, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

The Court further finds that on December 14, 1982, Christopher L. Stratychuck and Deborah D. Stratychuck, executed and delivered to REALBANC, INC. their mortgage note in the amount of $50,000.00, payable in monthly installments, with interest thereon at the rate of twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, Christopher L. Stratychuck and Deborah D. Stratychuck, husband and wife, executed and delivered to REALBANC, INC. a mortgage dated December 14, 1982, covering the above-described property. Said mortgage was recorded on December 22, 1982, in Book 4658, Page 841, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 6, 1988, FirsTier Mortgage Co., formerly known as Realbanc, Inc. assigned the above-described mortgage note and mortgage to Leader Federal Savings & Loan Association. This Assignment of Mortgage was recorded on September 20, 1988, in Book 5129, Page 477, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 5, 1989, Leader Federal Bank for Savings assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C. This Assignment of Mortgage was recorded on December 15, 1989, in Book 5225, Page 1863, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Steven Jay Lambert and Carol Ann Lambert, are the current title holders to the property by virtue of a General Warranty Deed dated August 3, 1984, and recorded on August 10, 1984 in Book 4810, Page 225, in the records of Tulsa County, Oklahoma; and the Defendants, Steven Jay Lambert and Carol Ann Lambert, are the current assumptors of the subject indebtedness.

The Court further finds that on October 6, 1989, the Defendant, Steven Jay Lambert and Carol Ann Lambert, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, Steven Jay Lambert and Carol Ann Lambert, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Steven Jay Lambert and Carol Ann Lambert**, are indebted to the Plaintiff in the principal sum of $71,718.70, plus interest at the rate of 12 percent per annum from March 30, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $32.00 which became a lien on the property as of June 26, 1992; a lien in the amount of $23.00 which became a lien as of June 25, 1993; and a lien in the amount of $65.00 which became a lien as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendant, **City of Broken Arrow, Oklahoma**, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as show on the duly recorded plat.

The Court further finds that the Defendant, **Fleet Real Estate Funding Corp.**, has no right, title or interest in the subject real property, having previously filed a Quitclaim Deed on May 26, 1994, in Book 5628, Page 293, in the records of Tulsa County, Oklahoma, and is therefore dismissed.

The Court further finds that the Defendants, **Steven Jay Lambert and Carol Ann Lambert**, have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Steven Jay Lambert and Carol Ann Lambert**, in the principal sum of $71,718.70, plus interest at the rate of 12 percent per annum from March 30, 1994 until judgment, plus interest thereafter at the current legal

rate of 5.67 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $120.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Steven Jay Lambert, Carol Ann Lambert, and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **City of Broken Arrow, Oklahoma**, has no right, title, or interest in the subject real property except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Fleet Real Estate Funding Corp.**, has no right, title, or interest in the subject real property and shall be dismissed as a party.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Steven Jay Lambert and Carol Ann Lambert**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for

the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $120.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants

and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

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Judgment of Foreclosure
Civil Action No. 94-C 319B
NBK:lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 14 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LIBERTY MUTUAL INSURANCE COMPANY, UNITED PARCEL SERVICE OF AMERICA, INC., and ALKO CORPORATION,

Plaintiffs,

vs.

KAN-ARK INDUSTRIES, INC., now KAI, INC., and AETNA CASUALTY & SURETY COMPANY OF ILLINOIS,

Defendants/Third-Party Plaintiffs,

vs.

BUILDERS STEEL CO., INC., and CONTINENTAL INSURANCE COMPANY,

Third-Party Defendants.

CASE NO. 93-C-1105-B

ENTERED ON DOCKET

DATE SEP 14 1994

ORDER

This matter comes on for consideration of Plaintiffs', Liberty Mutual Insurance Company, (Liberty), United Parcel Service Of America, Inc., (UPS), and Alko Corporation, (Alko), Motions for Summary Judgment against Defendants Kan-Ark Industries, Inc. now KAI, Inc. (Kan-Ark) and Aetna Casualty & Surety Company Of Illinois (Aetna), docket entries # 34 and 42 respectively.

This case involves the 1988 construction and erection of a UPS parcel outlet in Tulsa, Oklahoma, owned by Alko, a subsidiary of UPS. Kan-Ark, a contractor, agreed in writing to construct and erect the building. Kan-Ark, as allowed by its construction contract with UPS/Alko, subcontracted work on the project with

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Builders Steel Co., Inc. (Builders). An employee of Builders, Mark Allen Reynolds (Reynolds), was allegedly severely injured, on August 11, 1988, when the building collapsed while supported by temporary supports.[1]

Liberty issued a general liability policy to Alko and UPS. Aetna issued a liability policy for Kan-Ark. Both policies provide expansive coverage and are alleged to be primary policies.

Reynolds filed suit in Tulsa County District Court against multiple defendants including Alko and UPS in August, 1990. The case was dismissed as to Alko and UPS in March, 1991, and also dismissed on June 25, 1991 as to Mansur-Daubert-Strella, Inc., (Mansur) who designed the building. Reynolds then refiled the action, within the one year allowed (12 O.S. §100), including as defendants Alko, UPS, Mansur and RB&W Corporation (RB&W), the latter allegedly on a theory of product liability (alleged defective steel). Neither Kan-Ark nor Builders was sued in the state court action ostensibly because of preclusion by Reynolds' workers compensation claim status. Reynolds is not a party to the present action. Third Party Defendant Transcontinental Insurance Company (CNA), included variously in the present action as Continental Assurance Insurance Company and Continental Assurance Company, was Builders liability carrier and has been dismissed by stipulation between Builders and Kan-Ark.

PLAINTIFFS' MOTION AGAINST KAN-ARK

Plaintiffs seek declaratory judgment against Kan-Ark finding

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[1] It is not clear from the pleadings what actually occurred to cause Reynolds' alleged injuries.

that the indemnity clause contained in the contract between Alko and Kan-Ark (the contract)" is valid and enforceable against Kan-Ark and that Kan-Ark is obligated to defend and indemnify and save harmless Plaintiffs herein for all claims, damages, losses, verdicts, judgment, costs and expenses including attorney's fees arising out of a lawsuit filed in the District Court of Tulsa County, styled Reynolds vs. RB&W Corporation, et al., Case No. CJ-92-596."

Kan-Ark responds, arguing it has no obligation to defend UPS and Alko for the alleged negligence of RB&W or Mansur; that the policy issued by Aetna to Kan-Ark obligates Aetna to defend and indemnify Kan-Ark against the claims of UPS and Alko. Kan-Ark also argues that UPS and Alko are immune from any liability to Reynolds and that Alko and UPS are therefor not entitled to indemnity from Kan-Ark. On this latter issue Kan-Ark asks for summary judgment against Plaintiffs. However, Kan-Ark has filed no formal motion seeking summary judgment. The Court will not consider Kan-Ark's informal request.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322. 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

> "[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*, wherein the Court stated that:

> ". . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

The contractual agreement between UPS/Alko and Kan-Ark provides, in part, as follows:

"Article 14. Indemnity and Insurance

a. Indemnity.

* * *

. . . All references to Owner in this article shall

include United parcel Service of America, Inc., . . and each of [its] subsidiaries.

* * *

Contractor hereby assumes the entire responsibility and liability for any and all damage and injury of any kind and nature whatsoever, caused by, resulting from, arising out of, incidental to, or accruing in connection with the execution of the work provided for in this contract. Such damage and injury shall include damage to property, including the work, theft, and injury to all persons, including employees of contractor and its subcontractors, including death resulting therefrom . . .

Contractor agrees to indemnify and save harmless owner, its agents, servants and employees from and against any and all claims, liabilities, loss and expenses by reason of any liability imposed by law upon owner for any above described damage or injury, however such may be caused, including but not limited to such damage or injury as is caused by the sole or concurrent negligence of owner, its agents, servants or employees, whether active or passive negligence, and whether based upon any alleged breach of any statutory duty, or administrative regulation, or otherwise . . ."

Plaintiffs argue the above "Mother Hubbard" indemnity clause clearly imposes an indemnification duty upon Kan-Ark relative to the state court action since the alleged injury to state-court Plaintiff Reynolds was "caused by, resulting from, arising out of, incidental to, or accruing in connection with the execution of the work provided for in this contract", citing Fretwell vs. Protection Alarm Co., 764 P.2d 149 (Okla.1988). The Court agrees with Plaintiffs that Fretwell and its precursors clearly hold that agreements, which have the result of indemnifying one against his own negligence, are, subject to strict construction of the agreement itself, enforceable. See, Sinclair Oil & Gas vs. Brown, 333 F.2d 967 (10th Cir.1964); Colorado Milling & Elevator Co. vs. Chicago, Rock Island & Pacific RR Co., 382 F.2d 834 (10th Cir.1967); Transpower Constructors vs. Grand River Dam Auth., 905

F.2d 1413 (10th Cir.1990); Chicago, Rock Island & Pacific RR Co. vs. Davila, 489 P.2d 760 (Okla.1971).

However, none of these authorities stand for the proposition that past, already allegedly committed negligence may be readily indemnified by an agreement that references the "the execution of the work provided for in this contract." Id. Specifically, Fretwell, citing 41 Am Jur 2d *Indemnity* §9 (1968), holds that:

> "[I]t is now the prevailing rule that a contract may validly provide for the indemnification of one against, or relieve him from liability for, his own future acts of negligence provided the indemnity against such negligence is made unequivocally clear in the contract." (emphasis by the court)

UPS and Alko are each sued in state court based on an allegation of their failure:

> "to adequately supervise the erection of said United Parcel Service (U.P.S.) building at the location of 71st and South Garnett in Tulsa County, Oklahoma, Defendant[s] knew or should have known that such negligence would likely result in injury to persons, including the Plaintiff."

Further, UPS is sued in state court on two additional theories, which are defective design of the building and failure to comply with minimum industry standards in design, the latter arguably a sub-part of the former.

Kan-Ark argues that since RB & W (the supplier of the steel for the building) and Mansur (the designer of the building allegedly in consort with UPS) are sued in state court on these same theories along with UPS/Alko, Kan-Ark has no indemnification liability to Plaintiffs regarding these theories because neither UPS nor Alko can be held liable at law for the negligence of RB & W and Mansur. This argument fails to consider the possibility of

joint liability on the part of UPS and Mansur for defective design, or the joint tortfeasor reality of alleged non-compliance with industry standards by UPS in specifying the alleged inferior steel supplied by RB & W.

Kan-Ark further argues that it has no indemnification exposure to UPS and Alko because UPS/Alko cannot be held liable in the state court action for the reason that Reynolds' claim is exclusively under the Workers' Compensation Statutes and "[S]ince UPS/ALKO is legally immune from liability under the Workers' Compensation Act, the claims of the plaintiff in the Reynolds suit are not within the scope of the indemnity clause." Kan-Ark attempts to track the putative UPS/Alko immunity by its argument that "UPS/ALKO would be liable for compensation payments to Reynolds under the Act . . . if neither Builders Steel nor KAI [Kan-Ark] had workers' compensation insurance coverage."

The Court concludes this argument wanders far afield since there is nothing in the record to support the lack of compensation insurance by either Builders or Kan-Ark nor any characterization of Reynolds' state court claim as a workers' compensation claim. Further, Kan-Ark acknowledges that workers' compensation immunity would not extend to the "negligent preparation of design plans and specifications" because "building plans were simply not part of the "work" covered under the agreement", a position the Court finds eminently sensible. However, while alleged negligent design (and its sub-part, failure to comply with industry standards in the design) is not part of the "work" because done before the work commenced, alleged negligent supervision of the

construction/erection is part of the "work" contemplated by the contract.

Therefore, the Court concludes that Kan-Ark has defense/ indemnification liability to the Plaintiffs for alleged negligent supervision if Plaintiffs suffer such exposure in the state court action. The Court concludes Kan-Ark has no potential indemnification exposure to Plaintiffs regarding alleged negligent design and/or failure to comply with industry standards in the design. The Court, therefore, grants in part and denies in part Plaintiffs' Motion For Summary Judgment as to Kan-Ark.

PLAINTIFFS' MOTION AGAINST AETNA

Plaintiffs also seek declaratory judgment against Aetna finding:

"1) That Alko and UPS are insureds under the policy issued by Aetna and that the policy covers Alko and UPS for acts and damages complained of in a lawsuit filed naming UPS and Alko a(sic) Defendants, amongst others, said lawsuit being filed in the District Court of Tulsa County, styled Reynolds vs. RB&W Corporation, et al., Case No. CJ-92-596.

"2) That the Aetna contract of insurance is primary as between the two insurance policies involved herein, Aetna and Liberty, That the "other insurance" clause of the Aetna policy is a primary coverage clause and that the "other insurance" clause of the Liberty policy is an excess coverage clause.

"3) That the Aetna policy insuring agreement is broad enough to include and does cover any punitive damages which might be assessed against UPS and Alko in the underlying State District

Court action based upon the allegations of the State Court Petition and the acts complained of by Plaintiff against UPS and Alko." Plaintiffs, in sum, seek complete indemnity from Aetna.

Aetna's response asserts that the scope of coverage provided to Alko and UPS as additional insureds under the liability policy it issued to Kan-Ark does not include all of the allegations of Reynolds' state court action against Alko, UPS and others; that any liability thereunder is strictly limited by the language of the insurance contract (the Aetna policy). Specifically, Aetna argues its policy excludes coverage for design defects and that, further, Plaintiffs are immune from liability because Reynolds' exclusive remedy is under the Workmen's Compensation Act. Also, Aetna argues that summary judgment is now inappropriate because it is not known (and presumably will not be until the state court action is tried) specifically what caused Reynolds' alleged injuries and whether alleged negligent design or supervision was a or the causative factor(s).

Aetna also argues that both the Liberty policy and the Aetna policy are "primary" policies and, therefore, sharing of the any loss between Liberty and Aetna should be ordered. Aetna additionally argues summary judgment on the issue of punitive damages is premature because the facts giving rise to punitive damage exposure are either unknown or in dispute, making a present ruling thereon premature.

In addition, Aetna argues that if Kan-Ark has a duty to indemnify Plaintiff then Builders has a corresponding duty to indemnify Kan-Ark. Aetna has filed no summary judgment motion

against Builders and no corresponding response to Aetna's assertion in this pleading has been filed by Builders. Therefore, the Court will not consider Aetna' informal motion.

Lastly Aetna argues that it is not estopped to deny coverage to Alko and UPS because it has provided a defense to Alko and UPS under a reservation of rights and these parties are in no way prejudiced by its present conclusion that coverage under the policy is lacking.[2]

The Court's conclusions regarding Kan-Ark's design, and failure to comply with industry standards in design, potential exposures simplifies Aetna's liability. If Kan-Ark has no exposure on these issues, *a fortiori*, Aetna has no potential lability. However, Kan-Ark's indemnification liability on the alleged negligent supervision issue posits before the Court the issues of primary coverage and punitive damage coverage.

It is clear from the Aetna policy that UPS and Alko are additional insureds under the policy. UPS, "and each of [its] subsidiaries" are specifically named. Plaintiffs Exhibit E-1. Aetna's argument that its policy excludes coverage for design defects becomes moot, as seen above, in the face of the Court's ruling that Kan-Ark has no design exposure under its construction contract with Plaintiffs. Further, the Court's ruling on the workers' compensation issue also moots Aetna's argument that, since

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[2] Aetna provided a defense for Alko and UPS in the original state court action without a reservation of rights. However, the defense provided by Aetna as to the subsequent state court action was done under a reservation of rights.

Plaintiffs are immune from liability because Reynolds' exclusive remedy is under the Workmen's Compensation Act, there remains no possible liability for Aetna to insure on behalf of Kan-Ark. Moreover, the indemnification exposure of Kan-Ark implicates the Aetna policy unless affected by excluding language therein.

Thus the remaining issues then are: (1) Is the Aetna policy coverage primary, primary on a shared exposure basis, or excess; and (2) Does the Aetna policy provide coverage for potential punitive damages.

Aetna acknowledges that its policy "is primary except in certain situations, which are not relevant to this case. Aetna Response Brief, p. 20. However, Aetna asserts if its policy is primary "our obligations are not affected unless any of the other insurance is also primary" and that "when any other insurance is also primary, and if that insurance permits contribution by equal shares, Aetna will also follow that method."

Plaintiffs urge that, although the Liberty policy states that "[T]he insurance afforded by this policy is primary insurance" the general amendatory endorsement excludes coverage where "other insurance" is available, as follows:

> 10. Other Insurance
>
> With respect to losses to which this policy applies by reason of the coverage afforded by this endorsement, this policy does not apply to that portion of the loss for which the 'insured' has other valid and collectible insurance, whether on a primary, excess or contingent basis unless such insurance was specifically purchased by the 'named insured' to apply in excess hereof."

Already resolved is Aetna's admission that its policy was not an "excess policy". Further, the construction contract between

UPS/Alko and Kan-Ark required the latter to purchase liability insurance for the protection of UPS/Alko from exposure stemming from fulfillment of the contract itself.

Plaintiffs characterize the Liberty policy as an excess or "super-excess clause", borrowing the phrase from Maryland Casualty Company vs. Horace Mann Insurance Company, 551 F.Supp 907, at 910 (W.Dist.Pa.1982), affirmed 720 F.2d 664 (1983). The Court agrees with the Maryland Casualty rationale: the insurer is not avoiding all liability (such as in a "super-escape clause") but is postponing liability until certain circumstances exist. In Maryland Casualty the following appears:

> "This policy does not apply to that *portion* of any claim . . . against the insured which is insured by another valid policy or policies of insurance, whether primary or excess, . . . nor shall the company be liable to make any payment in connection with any such *portion* of a claim or suit." Id at 910. (emphasis in original)
>
> * * *
>
> "Stated another way, the plain language of the contract provides that, if coverage is absent, Horace Mann will assume primary responsibility. If primary coverage is available to pay a portion of the claim, defendant will supply its coverage to pay the balance, if any, after the primary coverage is exhausted. If primary and excess coverage are available to cover a portion of the claim, defendant will apply its coverage to that portion of the claim which is not discharged by the primary and excess carriers." Id at 910.

The Court views as disingenuous a situation where, by contract, potential liability for negligence is passed on (even including the owner's own negligence) to a construction contractor yet the liability insurance the contractor is required by the contract to obtain contains putative provisions which arguably enables the liability insurer to share its loss exposure with the

owner's own liability carrier. The Court concludes the whole purpose of the indemnification clause and liability insurance requirement was to reduce Plaintiffs' exposure to, ideally, zero for negligent acts that might occur during the completion of the construction contract. Plaintiffs' prudence by carrying liability insurance should not enure to the benefit of the contractor's liability carrier, the existence of which was required by written agreement.

The Court next considers Plaintiffs punitive damages argument. Plaintiffs contend the Aetna policy language is sufficiently broad to cover punitive damages if awarded against Plaintiffs in the state court action. Aetna argues the punitive damages issue is premature because the "basis for punitive damages, if any, has not yet been established. Therefore, a question of fact exists, which is not appropriately resolved on summary judgment." The latter arguments fails to convince the Court because the issue of initial liability in the state court is factually intensive and has not yet been resolved yet summary judgment, declaring the rights of the parties, is entirely appropriate herein.

Plaintiffs rely on the following from the Aetna policy:

"SECTION 1 - COVERAGES

Coverage A. Bodily Injury and Property Damage Liability.

1. Insuring agreement.

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies."

Plaintiffs cite Dayton Hudson Corp. vs. American Mutual Liability Insurance, 621 P.2d 1155 (Okla.1980) as supporting authority on the

issues of whether punitive damages may be covered under a policy of insurance and whether there are exceptions to the public policy argument that it is against public policy to insure against punitive damages. The insuring agreement of the policy *sub judice* is similar in context with the Dayton Hudson phraseology. The Court is of the view that Dayton Hudson and the authorities cited therein, coupled with a plain reading of the Aetna policy set forth above, requires a conclusion that punitive damages centered in gross negligence are within the ambit of coverage in the Aetna policy.

SUMMARY

PLAINTIFFS' MOTION AGAINST KAN-ARK

The Court concludes that Kan-Ark has defense/indemnification liability to the Plaintiffs for alleged negligent supervision if Plaintiffs suffer such exposure in the state court action. The Court further concludes Kan-Ark has no potential indemnification exposure to Plaintiffs regarding alleged negligent design and/or failure to comply with industry standards in the design. The Court grants in part and denies in part Plaintiffs' Motion For Summary Judgment as to Kan-Ark, as stated.

PLAINTIFFS' MOTION AGAINST AETNA

The Court concludes that Alko and UPS are insureds under the policy issued by Aetna and that the policy covers Alko and UPS for acts and damages complained of in a lawsuit filed naming UPS and Alko as Defendants which lawsuit was filed in the District Court of Tulsa County, styled Reynolds vs. RB&W Corporation, et al., Case No. CJ-92-596, for alleged negligent supervision only.

The Court further concludes that the Aetna contract of

insurance is primary as between the two insurance policies involved herein, Aetna and Liberty, and that the "other insurance" clause of the Aetna policy is a primary coverage clause and that the "other insurance" clause of the Liberty policy is an excess coverage clause. Kan-Ark's argument that Aetna is estopped to deny coverage because it initially undertook to provide defense in the state court suit is overruled as moot in view of the above and for the further reason that Kan-Ark has no pending motion for summary judgment regarding such issue.

Lastly, the Court concludes that the Aetna policy insuring agreement is broad enough to include and does cover any punitive damages which might be assessed against UPS and Alko in the underlying State District Court action based upon the allegations of the State Court Petition and the acts complained of by Plaintiff against UPS and Alko as to the alleged negligent supervision only..

IT IS SO ORDERED this 14th day of September, 1994.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAX LEE RISHELL, Curator of the person and estate of KATHLEEN LACEY, an incapacitated person,

Plaintiff,

and

MARRIOTT CORPORATION, as Plan Fiduciary of the Marriott Corporation Multi-Med Health Plan,

Intervening Plaintiff,

vs.

JANE PHILLIPS EPISCOPAL MEMORIAL MEDICAL CENTER; JANE PHILLIPS EPISCOPAL HOSPITAL, INC., formerly JANE G. PHILLIPS MEMORIAL HOSPITAL, INC., d/b/a OKLAHOMA MEDICAL COLLECTION SERVICES; and CHARLES WELLSHEAR, M.D.,

Defendants.

Case No. 94-C-636-B

O R D E R

The Court has for decision the Defendants' Motions to Dismiss on the basis of subject matter jurisdiction for want of diversity and for failure to join indispensable parties under Fed.R.Civ.P. 19 (Docket #34 and #71).

Plaintiff, Max Lee Rishell, curator of the person and estate of Kathleen Lacey, an incapacitated person, filed this malpractice action on February 6, 1992, alleging Defendants were negligent in their medical care and treatment of Mrs. Lacey during her hospitalization in Bartlesville, Washington County, Oklahoma, for treatment of psychological illness (depression) in November 1990.

On November 11, 1990, while a patient Mrs. Lacey attempted suicide by hanging in her hospital room, at which time she experienced an episode of anoxia producing irreversible permanently disabling mental and physical injury requiring around-the-clock care. The complaint herein seeks damages personal to Mrs. Lacey for past and future pain and suffering, permanent disability, medical expenses, loss of earnings, etc.; praying for in excess of $50,000.00. Diversity of citizenship is the basis for federal court jurisdiction as it is asserted that Mrs. Lacey at the time of the filing of this action was a citizen of Louisiana as she was domiciled there and that Defendants are residents of the Northern District of Oklahoma. The Intervening Plaintiff, Marriott Corporation, also diverse, as Plan Fiduciary of the Marriott Corporation Multi-Med Health Plan, seeks to protect its subrogated medical insurance interest.

The action was originally filed in the Western District of Oklahoma where the trial court dismissed it for want of diversity subject matter jurisdiction. The Tenth Circuit Court of Appeals reversed the dismissal by its opinion of December 21, 1993, and remanded the case for further factual development and consideration on the issue of the presence of diversity of citizenship.[1]

During the pendency of the appeal, the Plaintiff herein, as

[1]In the Western District of Oklahoma there was also a motion to dismiss regarding venue urged by the Defendants which is now moot, the case having been transferred from the Western District of Oklahoma to the Northern District of Oklahoma which includes Washington County.

well as Mrs. Lacey's husband, Ralph Lacey, and her children, Jeffrey Ralph Lacey, Benjamen J. Lacey and Katherine Lynn Lacey, commenced an action in the District Court of Tulsa County, State of Oklahoma, Case No. CJ-92-05427. In the Tulsa County, Oklahoma action, Plaintiff herein asserts the same cause of action as in the instant case and the husband and children of Mrs. Lacey seek damages for loss of services, contributions, companionship and grief arising from the said alleged negligence of the defendant hospital and physician in November 1990.

The Subject Matter Jurisdiction Issue

In its opinion the Tenth Circuit Court of Appeals directed the court to conduct a Fed.R.Civ.P. 12(d) hearing as follows:

> "The district court must permit a full development of all the facts before making a determination of jurisdiction. Most critical to the paradigm we have posed is the best interest of Ms. Lacey. Additionally, because the issue was not presented to us, the district court should determine whether her domicile was changed by operation of the Louisiana code. Thereafter armed with all the facts, appropriate state law, and the principles we have articulated here, the district court will be able to make an informed determination of whether diversity exists."

The parties have agreed the record is complete and the diversity of citizenship subject matter jurisdiction question is at issue.

Concerning the issue of Mrs. Lacey's domicile being changed by operation of Louisiana law, the record reveals the dichotomy alluded to in the Court of Appeals opinion (n.5). The Louisiana Civil Code, art. 39 (West 1993), expressly provides that the interdict (Mrs. Lacey) has her domicile with her curator (Mr.

Rishell). The curator is domiciled in Missouri.[2] Page 4 of the Court of Appeals opinion states that diversity as it affects federal jurisdiction is a matter of federal not state law. Thus, the controlling statute is 28 U.S.C. § 1332(c)(2) which provides that the legal representative (curator) of an incompetent shall be deemed to be a citizen of the same state as the incompetent. But, in any event, whether in Louisiana or Missouri, as hereafter discussed, diversity of citizenship with the Defendants is present.

The record is replete with pro and con arguments regarding the domiciliary issue. Suffice it to say, however, when all of the exhibits and facts are reviewed and analyzed, it appears clear that in February 1992, Mrs. Lacey was domiciled in Slidell, Louisiana at the New Medico nursing facility for her own best interests. On a long-term basis this is where she could get the specialized and quality of care required on terms the available insurance and/or third-party payors, in conjunction with the health facility, would approve. (Deft. Ex. I to Jane Phillips Episcopal Hospital's Supplemental Brief in Support of Motion to Dismiss filed August 1, 1994). To this date Mrs. Lacey remains a resident of the New Medico facility in Slidell, Louisiana.

The determination of Mrs. Lacey's citizenship and domicile is to be made as of the date of filing of the complaint, i.e., February 19, 1992. Bank One, Texas v. Montle, 964 F.2d 48, 49 (1st

[2]Mr. Rishell, Mrs. Lacey's brother-in-law, was selected as curator because of his relationship and the fact that he is a registered nurse with considerable mental health type nursing experience.

Cir. 1992); Safeco Ins. Co. of America v. Mirczak, 662 F.Supp. 1155, 1158 (D.Nev. 1987); Hakkila v. Consolidated Edison, 745 F.Supp. 988, 989-90 (S.D. N.Y. 1990).

For the reasons stated above, Defendants' motion to dismiss for want of subject matter jurisdiction due to lack of diversity of citizenship is hereby OVERRULED.

The Indispensable Parties Issue

Defendants assert that the husband and children of Kathleen Lacey are indispensable party plaintiffs to this action. Since they are citizens of the same state as the Defendants, Oklahoma, this will destroy diversity of citizenship and deprive the court of subject matter jurisdiction. As pointed out above, Mrs. Lacey's husband and children are Plaintiffs in the Tulsa County, Oklahoma state action seeking damages for loss of spousal and parental consortium resulting from the same alleged negligence which is the subject of the instant action. Mrs. Lacey's claim herein is joined with the other family members' claim in the Oklahoma state court action.

Fed.R.Civ.P. 19(a) and 19(b) provide as follows:

> "(a) Persons to be Joined if Feasible.
>
> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if....(2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave

> any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest ....
>
> (b) Determination by Court Whenever Joinder Not Feasible.
>
> If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

Fed.R.Civ.P. 19 establishes the two-step analysis for determining who should be joined as parties in an action. The first step in subsection (a) provides for who should be joined if joinder is feasible. Under subsection 19(a)(2), a person should be joined if he claims an interest relating to the subject of the action and is so situated that disposition in his absence could impair that interest or subject the other parties to multiple or inconsistent liabilities. The second step of the Rule 19 analysis, set forth in subdivision (b), provides for whether the action should be dismissed or proceed without the party if joinder is not feasible.

The essence of Plaintiff's argument herein is that since the husband and children of Mrs. Lacey have separate and independent

claims, they should be permitted to proceed separately and are not indispensable parties in the instant action.

Two cases that are helpful precedent in this analysis concerning indispensable parties are Lopez v. Martin Luther King, Jr. Hospital, 97 F.R.D. 24 (C.D. Cal. 1983), and Aguilar v. Los Angeles County, 751 F.2d 1089 (9th Cir. 1985).

In Lopez, the parents of their brain-injured at birth child seek pre-majority parental damages authorized by California statute in a medical malpractice action. The plaintiffs are both Mexican nationals so there is diversity of citizenship in the action against the Southern California hospital. The injured minor child seeks damages for pain and suffering and her post-majority claim in an action in the Los Angeles, California state court in which her mother is plaintiff as guardian *ad litem*. The minor plaintiff's claim, if joined with the instant parents' action, would defeat diversity.

In Aguilar, the facts are essentially a transparency of Lopez. The noncitizen parents of a brain-injured minor brought a diversity federal court action for medical malpractice seeking their damages. Contemporaneously the minor plaintiff, through his mother guardian *ad litem*, filed a state court action for the minor's damages alleging medical malpractice. If the minor's action were joined with the parents' federal court action, it would defeat diversity.

In both Lopez and Aguilar, the court's Fed.R.Civ.P. 19(a) and (b) analysis resulted in dismissal of the federal court action for failure to join an indispensable party. This court thinks the

well-reasoned opinions of Lopez and Aguilar serve as precedent herein. In Aguilar, 751 F.2d at 1093, the court said:

> "We affirm the district court's choice of the reasoning in Lopez v. Martin Luther King, Jr. Hospital, 97 F.R.D. 24 (C.D. Cal. 1983), rather than that in Cortez v. County of Los Angeles, 96 F.R.D. 427 (C.D. Cal. 1983). Lopez properly construed the Rule 19(a)(2) 'interest' requirement as not limited to a 'legal' interest, but one to 'be determined from a practical perspective, not through the adoption of strict legal definitions and technicalities.' Lopez, 97 F.R.D. 24, 29 (C.D. Cal. 1983). This reasoning is supported by ample authority. See Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102, 110, 88 S.Ct. 733, 738, 19 L.Ed.2d 936 (1968); Kaplan v. International Alliance of Theatrical & Stage Employees, 525 F.2d 1354, 1361 (9th Cir. 1975); Smith v. State Farm Fire & Casualty Co., 633 F.2d 401, 405 (5th Cir. 1980). The Aguilars' approach, which emphasizes the distinct legal causes of action asserted by parents and child, focuses on legal technicalities and runs contrary to the prevailing view that 'interest' under Rule 19 should be determined from a practical, and not technical, perspective."

In Lopez, 97 F.R.D. at 28-29, the court stated:

> "To this end, Rule 19 matters should be governed by practical considerations. Indeed, the Rule was amended in 1966 in an attempt to forestall what was developing as a rigid, formalistic approach to compulsory joinder under the old version of the Rule. In one of the most widely cited opinions on Rule 19, the Supreme Court concluded that the current version of the Rule 'emphasizes pragmatic considerations ... of proceeding or dismissing.' Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 116-117 n. 12, 88 S.Ct. 733, 741 n. 12, 19 L.Ed.2d 936 (1968). Citing the Committee Reports on the 1966 Amendments, the Court further noted that 'there has been undue preoccupation with abstract classifications of rights or obligations as against consideration of the particular consequences of proceeding with the

> action ....' Id. at 116, n. 12, 88 S.Ct. 741-42, n. 12. Common sense and realistic appraisals should play the primary role in making Rule 19 determinations. See Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee, 662 F.2d 534, 537 (9th Cir. 1981) (look to the practical effects of joinder or non-joinder rather than rigid formula); Gentry v. Smith, 487 F.2d 571, 579-580 (5th Cir. 1973) (pragmatic considerations include granting the maximum effective relief with the minimum expenditure of judicial energy."

Lopez also points out on page 29 that Rule 19(a)(2) does not require the same legal interest; it merely requires "an interest relating to the subject of the action."

The parties in the instant action concede that collateral estoppel applies under Oklahoma law to bar the husband's and children's derivative action if an adverse liability judgment is entered herein. Thus, under Fed.R.Civ.P. 19(a)(2), a disposition in the present action may impair or impede the husband's and children's ability to protect their own interests.

Four factors are set out in Rule 19(b) to be considered when deciding whether to proceed or dismiss the action. Justice Harlan in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968), characterized these factors as follows: "(1) plaintiff's opportunity to proceed in an alternative forum; (2) defendant's desire to avoid multiple litigation or inconsistent judgments; (3) prejudice to the absentee; and (4) the interest of the courts and the public in complete, consistent and efficient settlement of controversies."

Some courts have indicated that the most important of the four

factors in Rule 19(b) is the availability of an alternative forum. Anrig v. Ringsby United, 603 F.2d 1319, 1326 (9th Cir. 1979); Gottlieb v. Vaicek, 69 F.R.D. 672 (N.D.Ill. 1975), *aff'd*, 544 F.2d 523 (7th Cir. 1976); and Potomac Electric Power Co. v. Babcock & Wilcox Co., 54 F.R.D. 486 (D.Md. 1972).

The Plaintiffs herein have an adequate state forum. The causes of action brought herein can be joined to the current action pending before the Tulsa County, Oklahoma district court, thereby enabling one court to dispose of the entire controversy.[3] Professor Moore has noted that "[w]hen the state court remedy is live, the district courts have been slow to deem it inadequate." 3A J. Moore, *Moore's Federal Practice* ¶ 19.07-2[4] (2d ed. 1982).

Two lawsuits have already been filed that derive from essentially the same set of facts and require consideration of the same legal issues relative to liability. The Defendants have a strong and legitimate interest in being involved in one action rather than two.

In Lopez, 97 F.R.D. at 33, the court stated:

> "Public policy dictates that in these times of crowded dockets and limited judicial resources, litigants should avoid, if possible, the maintenance of two identical lawsuits in separate forums. The policy interest in avoiding piecemeal litigation is especially strong where, as here, it is evident that the ongoing state court action can adjudicate the entire controversy. *See* Evergreen Park Nursing

[3]The state court action has been stayed pending the rulings herein. It is not this court's place to rule on the appropriateness of the Tulsa County district court venue.

& Convalescent Home, Inc., *supra* at 1116. This does not mean that federal courts may absolve themselves from exercising jurisdiction with unbounded discretion in pursuit of 'judicial economy.' *See* Colorado River Water Conservation District v. United States, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976). In this regard, the Court believes that the words of former Chief Justice Aldrich of the First Circuit are instructive:

> 'It is true that the effect of the dismissal of the action is to deny this plaintiff the benefits of diversity jurisdiction, and that it has sometimes been said that federal courts 'will strain hard' to support diversity jurisdiction in the application of Rule 19. [citations omitted] However, we are shown nothing in the case at bar to make us believe that this factor, if important, is as important as relegating the parties to a jurisdiction, the existence of which has not been denied, where full workable and reasonable relief may be granted. This has been the customary result in similar situations, whether the absent [party was] termed indispensable or otherwise.'

Stevens v. Loomis, 334 F.2d 775, 778 (1st Cir. 1964)."

Plaintiff argues that Aguilar is distinguishable from the instant action because the relative position of the parties is reversed. Aguilar, 751 F.2d at 1093 answers this argument by stating that if collateral estoppel applies, such is a distinction without a difference. Even the dissent in Aguilar accepts this premise but attempts to make the point that in Aguilar collateral estoppel is not a probability under existing California law. However, the majority concluded that collateral estoppel was

applicable under California law. In the instant action, as stated above, the parties concede that collateral estoppel would apply to defeat the husband's and children's derivative claims if an adverse liability judgment was entered herein.

In conclusion, for the reasons stated above, this action is dismissed, without prejudice to proceeding in a state court action, for want of indispensable parties plaintiff, the husband and children of Mrs. Lacey, who, if joined herein, would defeat diversity jurisdiction.

IT IS SO ORDERED this 14th day of September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 13 1994

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

PUBLIC SERVICE COMPANY OF OKLAHOMA, an Oklahoma corporation,

Plaintiff,

TRANSOK, INC.,

Plaintiff-Intervenor,

vs.

WAGNER & BROWN II, a partnership, GERALD ADKINS, and FALSE RIVER LIMITED,

Defendants,

STATE OF OKLAHOMA ex rel. Corporation Commission of the State of Oklahoma,

Defendant-Intervenor.

Case No. 92-C-477-BU

ENTERED ON DOCKET
DATE 9-14-94

ORDER

The Court has reviewed Plaintiff's Report on Activities Before Oklahoma Corporation Commission Pending Stay of Case filed on September 7, 1994. Having done so, the Court concludes that this matter should be administratively closed during the pendency of the proceedings before the Oklahoma Corporation Commission. It is therefore ordered that the Clerk administratively terminate this action in his records pending resolution of the proceedings before the Oklahoma Corporation Commission.

The parties are DIRECTED to advise the Court within ten (10) days of the final resolution of the proceedings before the Oklahoma Corporation Commission so that the Court may reopen this matter, if

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necessary, to obtain a final determination of the litigation.

ENTERED this 13th day of September, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 13 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

CHROMALLOY GAS TURBINE CORPORATION, d/b/a AERO TECHNICAL SERVICES, d/b/a CHROMALLOY COMPRESSOR TECHNOLOGIES, d/b/a AERO TECHNICAL SERVICES GROUP, and d/b/a AERO COMPONENT TECHNOLOGIES GROUP,	
Plaintiff,	
vs.	**Case No. 94-C-394-B**
T K INTERNATIONAL, INC.,	ENTERED
Defendant.	DATE SEP 14 1994

ORDER OF DISMISSAL WITH PREJUDICE

Upon consideration of the parties' Stipulation and Joint Motion for Entry of Agreed Order of Dismissal with Prejudice, the Court finds that the Joint Motion should be granted and hereby orders that this action is dismissed with prejudice.

Dated this 13 day of Sept., 1994.

S/ THOMAS R. BRETT

THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, a Pennsylvania Corporation

Plaintiff,

vs.

LEROY COURSEY,

Defendant.

Case No. 91-C-820-B

ORDER OF DISMISSAL

This matter comes on for hearing on the joint Stipulation of the Plaintiff, National Union Fire Insurance Company of Pittsburgh, PA and Defendant, Leroy Coursey, for a dismissal with prejudice of the above captioned cause against Defendant, Leroy Coursey. The Court, being fully advised, having reviewed the Stipulation, finds that the above entitled cause should be dismissed with prejudice to the filing of a future action as to Defendant, Leroy Coursey, pursuant to said Stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above entitled cause against Defendant, Leroy Coursey, be and is hereby dismissed with prejudice to the filing of a future action against said Defendant, the parties to bear their own respective costs.

Dated this 13th day of ~~August~~ Sept, 1994.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT COURT JUDGE

C:\WORD\29\108\DISMISS.ORD.ac

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM DEVERICK III,

Plaintiff,

v.

BLUE CIRCLE, INC., a Corporation,

Defendant.

Case No. 94-C-283-K

ORDER

This matter comes on for hearing on the parties' Joint Application for Dismissal Without Prejudice. This Court being fully advised in the premises finds that the above-styled matter should be dismissed without prejudice.

IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the above-styled matter is dismissed without prejudice.

s/ TERRY C. KERN

JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

BUFOGLE & ASSOCIATES

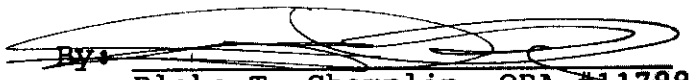
By: _____

Richard H. Reno, OBA #10454
3105 E. Skelly Dr., Suite 600
Tulsa, Oklahoma 74105
(918) 743-8598

Attorneys for
WILLIAM DEVERICK III

deverick.dis

SHIPLEY, INHOFE & STRECKER



By: _____

Blake T. Champlin, OBA #11788
3600 First National Tower
15 East 5th Street
Tulsa, Oklahoma 74103
(918) 582-1720

Attorneys for
BLUE CIRCLE, INC.

deverick.dis

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 13 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NANCY L. TRENERRY,

Plaintiff,

vs.

INTERNAL REVENUE SERVICE

Defendant.

No. 94-C-92-K

JUDGMENT

This matter came before the Court for consideration of the defendant's motion for summary judgment, which the Court treats as a motion to dismiss. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith, pursuant to Rule 58 F.R.Cv.P.,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this action is dismissed without prejudice.

ORDERED this 13 day of September, 1994.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 9-14-94

14

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 13 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IMMAD MANSOUR,

Plaintiff,

vs.

UNITED STATES BEEF CORPORATION,

Defendant.

No. 93-C-844-K

JUDGMENT

This matter came before the Court for consideration of the defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendant and against the plaintiff.

ORDERED this 12 day of September, 1994.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 9-13-94

29

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MILL CREEK LUMBER & SUPPLY COMPANY, an Oklahoma Corporation,

Plaintiff,

vs.

MJD CONSTRUCTION CORPORATION, a Pennsylvania Corporation, INTERNATIONAL FIDELITY, INC., a New Jersey Corporation, and INTERNATIONAL FIDUCIARY, INC. a Connecticut corporation.

Defendants.

Case No. 94-C-768-B

NOTICE OF DISMISSAL WITHOUT PREJUDICE OF DEFENDANTS INTERNATIONAL FIDELITY, INC. AND INTERNATIONAL FIDUCIARY, INC.

COMES NOW the Plaintiff, Mill Creek Lumber & Supply Company, and hereby dismisses Defendants International Fidelity, Inc. and International Fiduciary, Inc., without prejudice, in accordance with Fed. R. Civ. P. 41(a)(1)(i).

Respectfully Submitted,

JEFFREY T. DUNN OBA #15223
1630 East 26th Place
Tulsa, Oklahoma 74114
(918) 742-2738

Attorney for Plaintiff,
Mill Creek Lumber & Supply Company

CERTIFICATE OF MAILING

I, Jeffrey T. Dunn, hereby certify that on the 12th day of September, 1994, a true and correct copy of the above and foregoing instrument was mailed, with sufficient postage thereon, to the following:

Eugene Robinson, Esq.
McGivern, Scott, et al.
1515 South Boulder Avenue
P.O. Box 2619
Tulsa, Oklahoma 74101-2619

International Fidelity, Inc.
20 E. Willow Street
Melbourne, N.J. 07401

International Fiduciary, Inc.
ATTN: Mr. Mark Blechman
81 Commerce Street
Stamford, CT 06902

JEFFREY T. DUNN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 12 1994

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

WOOD SYSTEMS, INC., an Oklahoma Corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 94-C-769B
MJD CONSTRUCTION CORPORATION, a Pennsylvania Corporation, INTERNATIONAL FIDELITY, INC., a New Jersey Corporation, and INTERNATIONAL FIDUCIARY, INC. a Connecticut corporation.	)	
Defendants.	)	

NOTICE OF DISMISSAL WITHOUT PREJUDICE OF DEFENDANTS INTERNATIONAL FIDELITY, INC. AND INTERNATIONAL FIDUCIARY, INC.

COMES NOW the Plaintiff, Wood Systems, Inc., and hereby dismisses Defendants International Fidelity, Inc. and International Fiduciary, Inc., without prejudice, in accordance with Fed. R. Civ. P. 41(a)(1)(i).

Respectfully Submitted,

JEFFREY T. DUNN OBA #15223
1630 East 26th Place
Tulsa, Oklahoma 74114
(918) 742-2738

Attorney for Plaintiff,
Wood Systems, Inc.

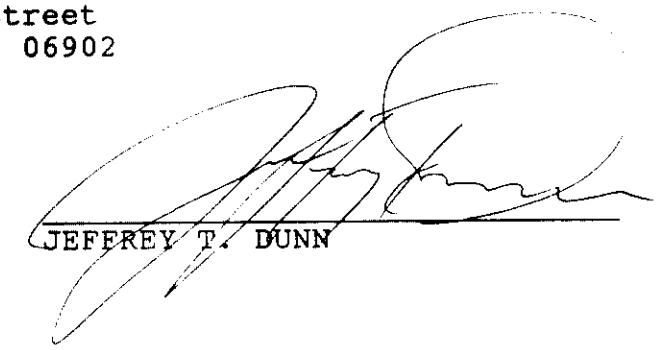
CERTIFICATE OF MAILING

I, Jeffrey T. Dunn, hereby certify that on the 12th day of September, 1994, a true and correct copy of the above and foregoing instrument was mailed, with sufficient postage thereon, to the following:

Eugene Robinson, Esq.
McGivern, Scott, et al.
1515 South Boulder Avenue
P.O. Box 2619
Tulsa, Oklahoma 74101-2619

International Fidelity, Inc.
20 E. Willow Street
Melbourne, N.J. 07401

International Fiduciary, Inc.
ATTN: Mr. Mark Blechman
81 Commerce Street
Stamford, CT 06902



JEFFREY T. DUNN

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEPHEN FORTMAN,	)	
	)	
Plaintiff,	)	
	)	FILED
vs.	)	
	)	SEP 12 1994
DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,	)	Richard M. Lawrence, Clerk U.S. DISTRICT COURT
	)	
Defendant.	)	
	)	**CASE NO. 93-C-944-B**

ORDER

DATE 9/12/94

Upon the motion of the defendant, Secretary of Health and Human Services, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Kathleen Bliss, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Secretary for further administrative action.

DATED this 12 day of Sept., 1994.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

KATHLEEN BLISS, OBA #13625
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, OK 74103-3809

33-212

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 12 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

DANIEL WADE HURD,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

Case No. 94-C-706B

DATE

ORDER

NOW on this 12 day of Sept., 1994, comes on for consideration plaintiff's application to dismiss without prejudice. Having reviewed the Court file and pleadings herein, this Court finds that said application should be and is hereby GRANTED.

IT IS THEREFORE ORDERED that plaintiff be allowed to dismiss his claim.

Judge

FILED

SEP 12 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CLIFFORD E. CRENSHAW,

Plaintiff,

v.

WILLIAM TELECOMMUNICATIONS GROUP, INC.,

Defendant.

Case No. 93-C-929-B

DATE

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed July 26, 1994, in which the Magistrate Judge recommended that the Defendant's Motion to Dismiss for Insufficiency of Service/Process be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

IT IS THEREFORE ORDERED that the Defendant's Motion to Dismiss ~~of~~ For Insufficiency of Service/Process is granted.

Dated this 12 day of Sept, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DARRELL RICHARD BESSER,

Plaintiff,

v.

FIBREBOARD CORPORATION, OWENS-CORNING FIBERGLAS CORPORATION, EAGLE-PITCHER INDUSTRIES, INC., PITTSBURGH-CORNING CORPORATION, CELOTEX CORPORATION, GAF CORPORATION, KEENE CORPORATION, OWENS-ILLINOIS, INC., RAYMARK INDUSTRIES, INC., H.K. PORTER COMPANY, INC., GARLOCK, INC., ARMSTRONG CORK COMPANY, FLEXITALLIC GASKET COMPANY, and FLINTKOTE COMPANY,

Defendants.

CASE NO. 91-C-932-B

O R D E R

The Complaint in this matter was filed December 6, 1991. The record fails to reflect any Return of Service indicating service upon Defendant Flintkote Company. The case is subject to dismissal without prejudice pursuant to Rule 4 (j), Federal Rules of Civil Procedure.

The Court concludes this matter as to Defendant Flintkote Company should be and the same is hereby DISMISSED without prejudice.

IT IS SO ORDERED this 12 day of September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 13 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ROBERT B. REICH,
Secretary of Labor,
United States Department of Labor

Plaintiff,

v.

LOCAL 76, UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO,

Defendant.

CIVIL ACTION

No. 94-C-331-E

CONSENT JUDGMENT

Plaintiff, Secretary of Labor, United States Department of Labor, has filed a complaint, pursuant to Title IV of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. § 401, et seq.], hereinafter referred to as the Act. Defendant, Local 76, United Food and Commercial Workers Union, AFL-CIO, hereinafter to as Local 76, has appeared by counsel, and notwithstanding its answer, and waiving further answer, agrees to the entry of this Judgment.

1. This action and the parties are properly before this Court pursuant to Title IV of the Act.

2. The complainant did file a timely complaint with the plaintiff on January 6, 1994, pursuant to section 402(a)(1) of the Act [29 U.S.C. § 482(a)(1)].

3. The Secretary of Labor properly filed his complaint based upon his investigation and belief of probable cause as required by 29 U.S.C. § 482(b).

4. By agreeing to this Consent Judgment, defendant does not admit that it engaged in any violations of 29 U.S.C. § 481(b) and (e),

ENTERED ON DOCKET
DATE 9-13-94

or any other provisions of the Act. Defendant is entering into this Consent Judgment in order to avoid the costs and burdens of protracted litigation.

5. The defendant agrees to the terms of this Judgment.

6. Accordingly, it is ORDERED, and DECREED as follows:

Defendant shall conduct an election for all offices, including new nominations, by December 31, 1994. The election shall be conducted by manual ballot, and absentee ballots shall be made available for the following reasons: work conflict, vacation, illness or disability, and military leave. The election shall be for a three year term to commence January 1, 1995, and shall be conducted under the supervision of the Secretary of Labor, in conformity with the provisions of the Act, and so far as lawful and practical, in conformity with the provision of its bylaws and the International Constitution.

7. The Stipulation of Settlement filed contemporaneously herewith and executed by the parties shall be incorporated by reference in this Consent Judgment.

8. The Secretary shall promptly certify to the Court the name of the person elected to each office, and the Court shall thereupon enter a decree declaring such persons to be the officers of the defendant.

9. It is further ORDERED, that each of the parties shall bear his or her own costs including attorneys fees.

Dated this 13 day of September, 1994.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
KENNETH NEIL BURKE aka Kenneth N. Burke; MONA KAY BURKE aka Mona K. Burke; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; **COUNTY TREASURER**, Tulsa County, Oklahoma; **BOARD OF COUNTY COMMISSIONERS**, Tulsa County, Oklahoma,	)	
	)	
Defendants.	)	CIVIL ACTION NO. 94-C-281-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12 day of Sept., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears not having previously filed a Disclaimer; and the Defendants, KENNETH N. BURKE and MONA KAY BURKE, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, KENNETH NEIL BURKE, was served a copy of Summons and Complaint on July 21, 1994, by Certified Mail; that the Defendant, MONA KAY BURKE, was served a

copy of Summons and Complaint on July 16, 1994, by Certified Mail; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on March 25, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 28, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 25, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 12, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Disclaimer on April 26, 1994; that the Defendants, KENNETH NEIL BURKE and MONA KAY BURKE, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on June 8, 1990, Kenneth Neil Burke and Mona Kay Burke, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 90-01576. The case was discharged on October 1, 1990, by the United States Bankruptcy Court for the Northern District of Oklahoma, and the case was subsequently closed on November 20, 1990.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real

property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot One (1), Block Twenty-eight (28), WESTERN VILLAGE FOURTH ADDITION, and Addition to Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

The Court further finds that on October 25, 1982, Jeffrey D. Allen and Kristi L. Allen, husband and wife, executed and delivered to Oklahoma Mortgage Company, Inc., their mortgage note in the amount of $41,600.00, payable in monthly installments, with interest thereon at the rate of Twelve and One-Half percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Jeffrey D. Allen and Kristi L. Allen, husband and wife, executed and delivered to Oklahoma Mortgage Company, Inc., a mortgage dated October 25, 1982, covering the above-described property. Said mortgage was recorded on October 28, 1982, in Book 4646, Page 1682, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 10, 1982, Oklahoma Mortgage Company, Inc., assigned the above-described mortgage note and mortgage to Utah Mortgage Loan Corporation. This Assignment of Mortgage was recorded on November 18, 1982, in Book 4652, Page 869, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 30, 1986, First Security Realty Services Corporation, fka Utah Mortgage Loan Corporation, assigned the above-described mortgage note and mortgage to The Lomas & Nettleton Company. This Assignment of

Mortgage was recorded on April 30, 1987, in Book 5019, Page 2393, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 6, 1989, Lomas Mortgage USA, Inc., formerly The Lomas & Nettleton Company, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on July 19, 1989, in Book 5195, Page 1792, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 29, 1986, Jeffrey D. Allen and Kristi L. Allen, husband and wife, granted a general warranty deed to the Defendants, Kenneth N. Burke and Mona Kay Burke, husband and wife. This deed was recorded with the Tulsa County Clerk on September 2, 1986, in Book 4966 at Page 2401 and the Defendants, Kenneth N. Burke and Mona KAY Burke, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that the Defendants, KENNETH N. BURKE and MONA KAY BURKE, made default under the terms of the aforesaid note and mortgage, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, KENNETH NEIL BURKE and MONA KAY BURKE, are indebted to the Plaintiff in the principal sum of $79,237.53, plus interest at the rate of Twelve and One-Half percent per annum from January 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $8.00 which became a lien on the property as of July 5, 1989; a lien in the amount of $30.00 as of June 26, 1992, and a claim in the amount of $26.00 for 1993 taxes, plus accruing costs and interest. Said lien and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, KENNETH NEIL BURKE and MONA KAY BURKE, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, and STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, KENNETH NEIL BURKE and MONA KAY BURKE, in the principal sum of $79,237.53, plus interest at the rate of Twelve and One-half percent per annum from

January 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $64.00 for personal property taxes for the years 1988, 1991 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, KENNETH NEIL BURKE, MONA KAY BURKE, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, KENNETH NEIL BURKE and MONA KAY BURKE, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the

Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $64.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

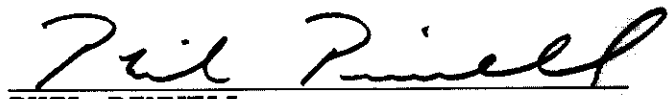
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-281-B

PP:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 12 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KYTCHREL MCGEE, JR.; SELETHA ROCHELLE MCGEE aka SELETHA HAWKINS MCGEE; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C 405B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12 day of Sept., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, **Kytchrel McGee, Jr. and Seletha Rochelle McGee aka Seletha Hawkins McGee**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Seletha Rochelle McGee aka Seletha Hawkins McGee**, will hereinafter be referred to as **("Seletha Rochelle McGee")**.

The Court further finds that the Defendants, **Kytchrel McGee, Jr. and Seletha Rochelle McGee**, were served by publishing notice of this action in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in Tulsa County, Oklahoma,

once a week for six (6) consecutive weeks beginning June 28, 1994, and continuing through August 2, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Kytchrel McGee, Jr. and Seletha Rochelle McGee**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Kytchrel McGee, Jr. and Seletha Rochelle McGee**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is

sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on May 12, 1994; and that the Defendants, **Kytchrel McGee, Jr. and Seletha Rochelle McGee**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot Twenty-seven (27), Block Eighteen (18), SUBURBAN HILLS ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on September 10, 1986, the Defendants, Kytchrel McGee, Jr. and Seletha Rochelle McGee, executed and delivered to FIRST SECURITY MORTGAGE COMPANY their mortgage note in the amount of $37,182.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Kytchrel McGee, Jr. and Seletha Rochelle McGee, then husband and wife, executed and delivered to First Security Mortgage Company a

mortgage dated September 10, 1986, covering the above-described property. Said mortgage was recorded on September 22, 1986, in Book 4971, Page 233, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 23, 1987, FIRST SECURITY MORTGAGE COMPANY assigned the above-described mortgage note and mortgage to MORTGAGE CLEARING CORPORATION. This Assignment of Mortgage was recorded on April 2, 1987, in Book 5012, Page 1563, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 25, 1990, MORTGAGE CLEARING CORPORATION assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on January 29, 1990, in Book 5233, Page 427, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Kytchrel McGee, Jr. and Seletha Rochelle McGee, were granted a divorce on March 23, 1990, Case No. FD-89-6525, in Tulsa District Court, Tulsa County, Oklahoma.

The Court further finds that the Defendant, Kytchrel McGee, Jr., filed his Chapter 7 Bankruptcy on August 20, 1990 in United State Bankruptcy Court for the Northern District of Oklahoma, Case Number 90-02381-C, which was discharged on December 26, 1990, and the case was closed on February 12, 1991.

The Court further finds that on January 1, 1990, the Defendant, Kytchrel McGee, Jr., entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its

right to foreclose. A superseding agreement was reached between these same parties on February 1, 1990 and June 1, 1990.

The Court further finds that the Defendant, Kytchrel McGee, Jr., made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Kytchrel McGee, Jr.**, is indebted to the Plaintiff in the principal sum of $54,028.04, plus interest at the rate of 10 percent per annum from April 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $2.00 which became a lien on the property as of July 2, 1990; a lien in the amount of $2.00 which became a lien on June 20, 1991; a lien in the amount of $18.00 which became a lien on June 26, 1992; a lien in the amount of $7.00 which became a lien on June 25, 1993; and a claim against the subject property in the amount of $7.00 for the tax year 1993. Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendants, **Kytchrel McGee Jr., and Seletha Rochelle McGee**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, **Kytchrel McGee Jr.**, in the principal sum of $54,028.04, plus interest at the rate of 10 percent per annum from April 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $36.00 for personal property taxes for the years 1989-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Kytchrel McGee Jr., Seletha Rochelle McGee and Board**

of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **Kytchrel McGee Jr.**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $36.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of

redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

NEAL B. KIRKPATRICK
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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 405B
NBK:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	FILED
	)	
Plaintiff,	)	SEP 12 1994
	)	
vs.	)	Richard M. Lawrence, Clerk U.S. DISTRICT COURT
	)	
EDWIN JAMES CHENEY, JR.;	)	
CAROLYN SUE CHENEY;	)	
PAULINE CHENEY;	)	
SAND SPRINGS HOME;	)	
CITY OF SAND SPRINGS, Oklahoma;	)	
COUNTY TREASURER, Tulsa County, Oklahoma;	)	ENTERED
	)	
BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	DATE 9-12-94
	)	
Defendants.	)	**CIVIL ACTION NO. 94-C-384-B**

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12th day of Sept., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, SAND SPRINGS HOME, appears on having previously filed a Disclaimer; the Defendant, CITY OF SAND SPRINGS, Oklahoma, appears not having previously filed a Disclaimer; and the Defendants, EDWIN JAMES CHENEY, JR., CAROLYN SUE CHENEY, and PAULINE CHENEY, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, EDWIN JAMES CHENEY, was served with process a copy of Summons and Complaint on June 9,

1994; that the Defendant, CAROLYN SUE CHENEY, was served with process a copy of Summons and Complaint on June 9, 1994; that the Defendant, PAULINE CHENEY, was served with process a copy of Summons and Complaint on July 19, 1994; that the Defendant, SAND SPRINGS HOME, acknowledged receipt of Summons and Complaint on April 18, 1994; that the Defendant, CITY OF SAND SPRINGS, Oklahoma, acknowledged receipt of Summons and Complaint on May 2, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 18, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 18, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 9, 1994; that the Defendant, SAND SPRINGS HOME, filed its Disclaimer on May 3, 1994; that the Defendant, CITY OF SAND SPRINGS, Oklahoma, filed its Disclaimer on May 12, 1994; and that the Defendants, EDWIN JAMES CHENEY, JR., CAROLYN SUE CHENEY, and PAULINE CHENEY, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on November 14, 1979, EDWIN JAMES CHENEY, JR. and PAULINE CHENEY, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 79-B-1338. On February 11, 1980, the United States Bankruptcy Court for the Northern District of Oklahoma filed

Discharge of Debtor and the case was subsequently closed on April 28, 1982.

The Court further finds that on June 21, 1991, EDWIN JAMES CHENEY, JR. and CAROLYN SUE CHENEY, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-2154-C. On October 18, 1991, the United States Bankruptcy Court for the Northern District of Oklahoma filed Discharge of Debtor and the case was subsequently closed on November 25, 1991.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot Fifteen (15), Block Ten (10), TOWN OF SAND SPRINGS, Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

The Court further finds that on November 30, 1978, the Defendants, EDWIN JAMES CHENEY, JR. and PAULINE CHENEY, executed and delivered to Liberty Mortgage Company, a mortgage note in the amount of $25,100.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, EDWIN JAMES CHENEY, JR. and PAULINE CHENEY, husband and wife, executed and

delivered to Liberty Mortgage Company, a mortgage dated November 30, 1978, covering the above-described property. Said mortgage was recorded on December 4, 1978, in Book 4369, Page 816, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 31, 1987, Liberty Mortgage Company, assigned the above-described mortgage note and mortgage to Universal Savings Bank F.A. This Assignment of Mortgage was recorded on December 31, 1987, in Book 5072, Page 1789, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 10, 1991, Universal Savings Bank F.A. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on April 16, 1991, in Book 5315, Page 1353, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 1, 1991, the Defendants, EDWIN JAMES CHENEY, JR. and CAROLYN SUE CHENEY, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, EDWIN JAMES CHENEY, JR., PAULINE CHENEY, and CAROLYN SUE CHENEY, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, EDWIN JAMES CHENEY, JR., CAROLYN SUE CHENEY, and

PAULINE CHENEY, are indebted to the Plaintiff in the principal sum of $26,861.58, plus interest at the rate of Nine and One-Half percent per annum from January 1, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $7.00 which became a lien on the property as of June 1993, and a claim in the amount of $6.00, for 1993 taxes. Said lien and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, EDWIN JAMES CHENEY, JR., CAROLYN SUE CHENEY, and PAULINE CHENEY, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, SAND SPRINGS HOME, and CITY OF SAND SPRINGS, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the

Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, EDWIN JAMES CHENEY, JR., CAROLYN SUE CHENEY, and PAULINE CHENEY, in the principal sum of $26,861.58, plus interest at the rate of Nine and One-Half percent per annum from January 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $13.00 for personal property taxes for the years 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, SAND SPRINGS HOME, CITY OF SAND SPRINGS, Oklahoma, EDWIN JAMES CHENEY, JR., CAROLYN SUE CHENEY, and PAULINE CHENEY, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, EDWIN JAMES CHENEY, JR., CAROLYN SUE CHENEY, and PAULINE CHENEY, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's

election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $13.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any

right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

NEAL B. KIRKPATRICK
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3900 U.S. Courthouse
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(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-384-B

NB:fl

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. SAM D. WILLIS aka SAMUEL D. WILLIS; SANDRA K. KNOX; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	CIVIL ACTION NO. 94-C 212B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12 day of Sept., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, **Sam D. Willis aka Samuel D. Willis and Sandra K. Knox**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Sam D. Willis aka Samuel D. Willis** will hereinafter be referred to as **("Sam D. Willis")**; and that the Defendants, **Sam. D. Willis and Sandra K. Knox** are both single, unmarried persons and have remained so since purchasing the property together in 1984.

The Court being fully advised and having examined the court file finds that the Defendant, **Sam D. Willis**, acknowledged receipt of Summons and Complaint on March 31, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 10, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 10, 1994.

The Court further finds that the Defendant, **Sandra K. Knox**, was served by publishing notice of this action in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning June 24, 1994, and continuing through July 29, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, **Sandra K. Knox**, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, **Sandra K. Knox**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary

evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on March 23, 1994; and that the Defendants, **Sam D. Willis and Sandra K. Knox**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot Twelve (12), Block Twenty-four (24), AMENDED PLAT OF NORTHRIDGE SECOND ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on June 25, 1984, the Defendants, Sam D. Willis and Sandra K. Knox, executed and delivered to Mercury Mortgage Co., Inc., their mortgage note in the amount of $43,284.00, payable in monthly installments, with interest thereon at the rate of thirteen and one-half percent (13%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Sam D. Willis and Sandra K. Knox, executed and delivered to Mercury Mortgage Co., Inc. a mortgage dated June 25, 1984, covering the above-described property. Said mortgage was recorded on June 27, 1984, in Book 4800, Page 875, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 21, 1989, Mercury Mortgage Co., Inc., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington D.C., his successors and assigns. This Assignment of Mortgage was recorded on April 21, 1989, in Book 5179, Page 92, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 1, 1989, the Defendant, Sam D. Willis, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on May 1, 1990 and September 1, 1990.

The Court further finds that the Defendants, Sam D. Willis and Sandra K. Knox, made default under the terms of the

aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Sam D. Willis and Sandra K. Knox**, are indebted to the Plaintiff in the principal sum of $71,429.49, plus interest at the rate of 13.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $5.00 which became a lien on the property as of July 2, 1990; a lien in the amount $4.00, which became a lien as of June 20, 1991; a lien in the amount of $25.00 which became a lien as of June 26, 1992; a lien in the amount of $13.00 which became a lien as of June 25, 1993; and a claim against the property in the amount of $13.00 for the tax year 1993. Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendants, **Sam D. Willis and Sandra K. Knox**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Sam D. Willis and Sandra K. Knox**, in the principal sum of $71,429.49, plus interest at the rate of 13.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $60.00 for personal property taxes for the years 1989-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Sam D. Willis, Sandra K. Knox and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Sam D. Willis and Sandra K. Knox**,

to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $60.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

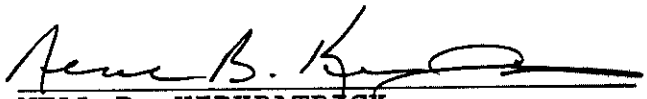
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
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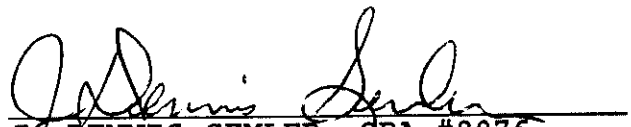

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Judgment of Foreclosure
Civil Action No. 94-C 212B

NBK:lg